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Supreme Court, U.S.
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No. 98-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

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JUSTO ENRIQUE JAY,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

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# Petition For Writ of Certiorari

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January 22, 1998

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## QUESTIONS PRESENTED

I. Whether a uniform, more liberal standard should apply to determine whether a post-conviction motion under 28 U.S.C. § 2255 warrants an evidentiary hearing in light of the limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996.

II Whether, once it is established that trial counsel's representation at sentencing fell below the *Strickland* objective standard of reasonableness, it is permissible for the original sentencing judge to dismiss a motion under 28 U.S.C. § 2255 claiming ineffective assistance based on the judge's assertion that he would have imposed the same sentence.

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# PETITION FOR A WRIT OF CERTIORARI

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Petitioner, Justo Enrique Jay, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Western District of North Carolina.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is an unpublished, per curiam order, reprinted in the Petitioner's Appendix. (Pet. App., *infra*, 1a). Pertinent district court opinions also are reprinted. (*Id.* at 6a-22a).

## JURISDICTION

The United States Court of Appeals for the Fourth Circuit affirmed the denial of post-conviction relief for the Petitioner on October 27, 1998. (Pet. App., *infra*, at 1a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2255 reads in pertinent:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt

hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

## STATEMENT OF THE CASE

The Petitioner is serving a sentence of life without the possibility of parole. In 1988, Petitioner was indicted in the Western District of North Carolina in two separate indictments. Indictment C-CR-88-20 charged Petitioner with engaging in a continuing criminal enterprise ("CCE"), in violation of 18 U.S.C. § 848. (Pet. App., *infra*, at 23a-24a). Indictment C-CR-88-21 charged Petitioner with a conspiracy to distribute cocaine, in violation of 18 U.S.C. § 846, as well

as 14 substantive cocaine offenses. (Pet. App., *infra*, 25a).

The government conceded and the trial court instructed the jury that, in order to convict the Petitioner of the CCE offense charged in Indictment C-CR-88-20, the government first had to prove the Petitioner was guilty of at least one of the substantive drug offenses occurring after March 9, 1983, charged in Indictment C-CR-88-21.[1] The prosecution's theory of guilt on the substantive drug offenses was that the Petitioner aided and abetted the commission of those offenses by selling cocaine to Fernando Lopez who then sold it to Mark Morningstar and Ronald Church, who then possessed and distributed the cocaine in North Carolina.

The Petitioner was tried on both indictments in a single trial. The sole piece of evidence that the Petitioner was the source of cocaine sold to Lopez consisted of a single sentence of testimony from a cooperating witness named Arsenio Diaz. Diaz testified that the Petitioner was Lopez's sole source of cocaine in 1983 and 1984. The Petitioner was convicted on all counts in both indictments.

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[1] The court instructed the jury: "[i]n order to find the defendant guilty of the charge of continuing criminal enterprise, you must find beyond a reasonable doubt that the defendant committed three or more successive violations of Federal Drug Laws over a definite period of time with a single or substantially similar purpose." Transcript of Trial Before the Honorable Robert D. Potter, United States District Judge,*United States v. Justo Enrique Jay*, August 1-4, at 623.

## I. Relevant Trial Testimony

A brief recitation of the trial testimony of three government witnesses highlights the reason why an evidentiary hearing on the Petitioner's § 2255 motion was warranted.

A. Ronald Church: Church was one of the two North Carolina dealers named in two of the substantive counts charged in Indictment C-CR-88-21 (counts 2 and 3). (Pet. App., *infra*, at 25a). He testified unequivocally that the Petitioner was not involved with cocaine distribution in North Carolina during the relevant time period; that is, from March 1993 forward. (*Id.* at 25a). He also testified that he did not know who was Lopez's source for cocaine.

B. Mark Morningstar: Morningstar was the other North Carolina dealer whose activities were the subject of substantive counts four through 15 of Indictment C-CR-88-20. He testified that he engaged in some cocaine transactions with the Petitioner and that *he continued to buy cocaine from the Petitioner and Lopez until he flushed two kilos down a toilet-- "until about '83."* (Pet. App., *infra*, at 41a) (emphasis added). Morningstar further testified that thereafter he had another source of cocaine for six to eight months and resumed his cocaine deals with *Lopez* in April 1983. (Pet. App., *infra*, at 43a). Subsequently, Morningstar joined with Lopez in several ventures to get cocaine directly from the Bahamas. (*Id.* at 46a). These deals were unrelated to, and kept secret, from the Petitioner. (Pet. App., *infra*, at 48a). On cross-examination, *Morningstar testified that his dealings with the Petitioner ended in January or February of 1983.* (*Id. at* 49a) (emphasis added). He agreed that cocaine brought into North Carolina as part of the substantive counts in Indictment C-CR-88-21 was the result of deals between

*only* himself and Lopez. (Pet. App., *infra*, at 50a).

C. Arsenio Diaz: Diaz was the key government witness against the Petitioner. The only offenses alleged to have been committed within the statute of limitations rested upon a single statement made by Diaz during his trial testimony. In its "Answer to Petitioner's Motion to Vacate, Set Aside or Correct Sentence" ("Government's Answer"), the government conceded that, without Diaz's testimony the jury might have reached a different result. (*Id.* at 52a).

Diaz provided the only critical testimony against the Petitioner by stating that Petitioner was Lopez's *only* source of cocaine for the relevant time period. Diaz testified Lopez did not have any other sources of cocaine until the end of 1984. (Pet. App., *infra*, at 54a).

This testimony by Diaz was relied on extensively by the prosecution. For example, the prosecutor told the court:

> Obviously Mr. Diaz' testimony goes most appropriately to the CCE and the conspiracy count, but I would ask the court not to limit all of its use for the substantive offenses because Mr. Diaz' testimony in part was that all of the cocaine that Mr. Lopez got and came to all these different people was from Mr. Jay. . . . And Mr. Diaz said that Mr. Jay was the source of that cocaine all the way through '83, even all the way through '84. And of course our theory or our charge is an aiding and abetting. Mr. Diaz' testimony needs to be allowed . . . .

(Pet. App., *infra*, at 56a).

And, in closing argument, the prosecutor told the jury:

> Mr. Diaz testified that relationship continued all the way through '83, with Mr. Jay being the exclusive source of supply for Mr. Lopez.

(*Id.* at 57a).

Other than Diaz's testimony implicating the Petitioner as an aider and abettor, no other evidence submitted at trial linked the Petitioner with the substantive offenses.

## II. Diaz's Recantation

Subsequent to Petitioner's trial, Diaz made out-of-court statements in which he consistently maintained that his trial testimony that the Petitioner was Lopez's sole source for cocaine in 1983 and 1984 was in error and that, in fact, he had no personal knowledge about the Petitioner supplying Lopez with the cocaine that was distributed in North Carolina in 1983.

## III. Sentencing

The transcript of the Petitioner's sentencing hearing clearly showed that his trial counsel failed to give the court any factual information to individualize the Petitioner's sentence. The Petitioner's trial counsel acknowledged this fact in his affidavit which was attached to the Government's Answer. (Pet. App., *infra*, at 86a). The Petitioner complained that his attorneys provided him with ineffective assistance when they failed to provide the court with any mitigating information about him or even request a sentence less than the maximum. In his affidavit, the trial attorney justified this failure on his assumption that the court would

not exercise its discretion and would simply sentence Petitioner to the maximum because of the nature of the crime and petitioner's failure to cooperate with the government. (*Id.*, at 86a).

## IV. Post-conviction Motion

Within one year of the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 [hereinafter AEDPA], Pub. L. 104-132, Title I, 110 Stat. 1214 (1996) (codified as amended 28 U.S.C. §§ 2244, 2253-55, 2261-66 (1998)), the Petitioner filed a motion under 28 U.S.C. § 2255 titled "Motion to Vacate Convictions and Sentence Pursuant To 28 U.S.C. § 2255 And 28 U.S.C. § 1651" ("§ 2255 Motion"). The 90-page motion raised several issues including ineffective assistance of counsel at trial and sentencing, and the recantation by Diaz of the critical claim that he knew that the Petitioner was Lopez's sole source of cocaine in 1983 and 1984. Along with his § 2255 Motion, Petitioner submitted detailed affidavits in support of his claims and he requested a hearing. In his response to the Government's Answer addressing Petitioner's claim that Diaz's testimony was false and that Diaz was willing to testify at a hearing to correct his testimony, Petitioner submitted three separate affidavits containing detailed factual allegations: (1) affidavit of Richard Martinez, Esquire, (Pet. App., *infra*, at 70a),[2] (2) affidavit of Guy Turner, Esquire, (*Id.* at 74a), and (3) affidavit of John Kenneth Zwerling, Esquire, (*Id.* at 58a). The Zwerling affidavit fully identified each of the attorney's who submitted affidavits, including Mr. Martinez, and described the circumstances under which they each obtained the information set forth in their affidavits.

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[2] The Martinez affidavit was also attached to Petitioner's § 2255 Motion.

Despite this substantial documentation and in the face of conflicting affidavits, the district court denied the Petitioner a hearing and denied his petition. (Pet. App., *infra*, 6a). The district court also denied Petitioner's Motion for Reconsideration. (*Id.*, at 21a).

As to the issue of Diaz's recantation, the district court denied Petitioner a hearing on this issue based solely on a finding that the Martinez affidavit lacked indicia of reliability. (Pet. App., *infra*, at 18a). In its order, the district court never even mentioned the affidavits of Mr. Zwerling or Mr. Turner, or the other supporting documentation which included notes of the Petitioner's trial counsel taken during a pre-trial interview with Diaz. Those notes showed that Diaz only *thought* that *some* of the cocaine Lopez sold in 1983 came from the Petitioner. Yet, at trial, Diaz was never confronted with his prior inconsistent statements to counsel. Also, Diaz's trial testimony was self-contradicting in that he acknowledged that he (Diaz) was a source of cocaine for Lopez during the crucial time period. The affidavits submitted by the Petitioner set forth that Diaz, through his own attorney, contacted the Petitioner's habeas counsel because Diaz wanted to set the record straight.

In light of the multiple affidavits submitted by attorneys and the supporting documentation regarding Diaz's recantation, only a hearing could give the district court the ability to judge the credibility of Diaz's recantation. After all, Diaz's trial testimony was the *only* evidence supporting the Petitioner's CCE conviction, the only conviction that carried a sentence of life without the possibility of parole.

The Petitioner appealed to the United States Court of Appeals for the Fourth Circuit which denied a certificate of appealability and dismissed the appeal based on the reasoning

of the district court. (Pet. App., *infra*, at 2a-3a).

## REASONS FOR GRANTING THE WRIT

### I. A UNIFORM, MORE LIBERAL STANDARD SHOULD APPLY TO DETERMINE WHETHER A PETITION SEEKING POST-CONVICTION RELIEF UNDER 28 U.S.C. § 2255 WARRANTS AN EVIDENTIARY HEARING IN LIGHT OF THE LIMITATIONS IMPOSED BY THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996.

As a result of the AEDPA, strict limitations were imposed on the time frame within which a post-conviction petition or motion for relief can be filed in federal court. *See* AEDPA §§ 101-105, 28 U.S.C. §§ 2241-2255. In general, under the new statute, a motion seeking relief under 28 U.S.C. § 2255 must be filed within one year of a final judgment of conviction. *See* 28 U.S.C. § 2255, ¶ 6. In addition, 28 U.S.C. § 2253(c)(1) limits a prisoner's ability to appeal from a denial of his § 2255 Motion. An appeal is permissible only if either a "Circuit Justice or judge" first issues a certificate of appealability and, under 28 U.S.C. § 2253(c)(2), prisoners must make a substantial showing of the denial of a "constitutional right." The statute essentially eliminates the opportunity to file multiple post-conviction petitions or motions, allowing for only "one bite at the apple" when it comes to post-conviction relief.

With respect to motions filed under 28 U.S.C. § 2255, the AEDPA did not change the hearing requirement. However, there is not a uniform standard among the federal circuits as to the standard to be applied to determine whether a post-conviction motion under 28 U.S.C. § 2255 warrants a

hearing. The Petitioner submits that because of the limitations imposed by the AEDPA, a more liberal standard should apply to determine whether a hearing is necessary and that where, as in the case at bar, there exist matters that occurred outside the courtroom and conflicting affidavits about facts upon which the court must necessarily make a finding in order to grant or deny the § 2255 motion, a hearing should be granted.

### A. The Federal Circuit Courts of Appeals Use Separate and Distinct Standards to Determine When A Post-conviction Motion Under 28 U.S.C. § 2255 Warrants An Evidentiary Hearing.

Section 2255 of Title 28 of the United States Code states that, unless the motions and records of the case "conclusively show that the prisoner is entitled to no relief," the court shall grant a hearing in order to determine the issues and make findings of fact and conclusions of law. 28 U.S.C. § 2255, ¶ 2. This Court had the opportunity to examine this language in *Marchibroda v. United States*, 368 U.S. 487 (1962), and articulated the standard that courts must apply when determining whether a petitioner's claims warrant an evidentiary hearing. *Marchibroda* held that where the petitioner's motion's and affidavits contain factual allegations, put in issue by the affidavits filed with the government's response, that relate primarily to purported occurrences outside of the courtroom and upon which the record can cast no light, an evidentiary hearing is necessary. *See id.* at 494-96. The *Marchibroda* Court found that, in accordance with the "conclusively show" language of 28 U.S.C. § 2255, even if the petitioner's "allegations are improbable and unbelievable," where the petitioner provides "specific and detailed factual assertions," a hearing is required. *See id.* at

495-96.

This Court built upon *Marchibroda* in *Fontaine v. United States*, 411 U.S. 213 (1973), and *Blackledge v. Allison*, 431 U.S. 63 (1977). The *Fontaine* Court remanded the case so that an evidentiary hearing could be held because the record failed to "conclusively show" that the petitioner could under no circumstances establish facts warranting relief and his motion set out "detailed factual allegations regarding alleged circumstances occurring after his arrest and before his appearance in court." *Fontaine*, 411 U.S. at 214-15. In *Blackledge*, the Court noted that federal courts may employ a variety of measures to avoid the need for an evidentiary hearing, including but not limited to those provided in the Rules Governing Habeas Corpus Cases ("RGHCC"). *See Blackledge*, 431 U.S. at 81. *See generally*, RGHCC, 28 U.S.C. p. 268-69 (1975 ed.). Under Rule 7 of the RGHCC, the judge can direct "expansion of the record to include any appropriate materials that enable the judge to dispose of some habeas petitions not dismissed on the pleading, without the time and expense required for an evidentiary hearing." *See Blackledge*, 431 U.S. at 83 (quoting RGHCC, 28 U.S.C. p. 269). The expanded record may include letters predating the filing of the petition in the district court, documents, exhibits, affidavits, and answers under oath to written interrogatories propounded by the judge. *See* RGHCC, Rule 7(b).

The *Blackledge* Court cautioned that "before dismissing facially adequate allegations short of an evidentiary hearing, ordinarily a district judge should seek as a minimum to obtain affidavits from all persons likely to have firsthand knowledge" of the matter in dispute. *Blackledge*, 431 U.S. at n.25. The *Blackledge* Court ended its discussion by warning that "*[w]hen the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive*, but that is not to

say they may not be helpful." *Id.* (quoting Advisory Committee Note to Rule 7, RGHCC, 28 U.S.C. p. 269) (emphasis added). Despite the clarity and succinctness of the *Marchibroda* decision and its application in *Fontaine* and *Blackledge*, the federal circuit courts of appeals have affirmed denials of a hearing by distinguishing *Marchibroda* in numerous ways based on differences in the facts of the case and justified by the courts' need to dispose of frivolous petitions in an efficient manner so as to alleviate the burden on their dockets. *See e.g., Halliday v. United States*, 380 F.2d 270, 274 (1st Cir. 1967); *King v. United States*, 576 F.2d 432, 438 (2d Cir. 1978); *United States v. Cifuentes*, 863 F.2d 1149, 1152 (3rd Cir. 1988); *United States v. Baysden*, 326 F.2d 629, 630 (4th Cir. 1964); *May v. Collins*, 955 F.2d 299, 311 (5th Cir. 1992); *Baker v. United States*, 781 F.2d 85, 90 (6th Cir. 1985); *Parker v. United States*, 358 F.2d 50, 54 (7th Cir. 1965); *United States v. Huffman*, 490 F.2d 412, 412 (8th Cir. 1973); *Fong v. United States*, 411 F.2d 1181, 1182 (9th Cir. 1969); *Hampton v. United States*, 504 F.2d 600, 602 (10th Cir. 1974).

The Petitioner submits that the summary disposition of post-conviction motions, such as occurred in this case, needs to be re-evaluated in light of the AEDPA where a prisoner now has only one opportunity to seek post-conviction relief and may not be granted an evidentiary hearing.

1. The Division in the Circuits

A review of the various courts of appeals decisions demonstrate that there is no uniformity among the federal circuit courts of appeals with respect to the standard to be applied to determine the necessity of a hearing. Review by this Court is warranted to provide the lower courts with

guidance for how to decide when an evidentiary hearing is required.

The Second Circuit has established that, where the petitioner asserts detailed, specific facts that are not inadmissible hearsay and may be competent evidence, a hearing should be granted. *See, e.g., Dalli v. United States*, 491 F.2d 758, 761 (2d Cir. 1974) (holding that no hearing was required where petitioner's affidavit failed to set forth specific facts that the petitioner was in a position to establish by competent evidence); *Newfield v. United States*, 565 F.2d 203, 207-08 (2d Cir. 1977) (affirming denial of petition without evidentiary hearing where it did not allege any new information); *Hayden v. United States*, 814 F.2d 888, 892 (2d Cir. 1987) (affirming denial of petition without evidentiary hearing because assertions were hearsay and not confirmed by any deposed witnesses).

In *Barry v. United States*, 528 F.2d 1094 (7th Cir. 1976), the Seventh Circuit went one step further than the Second Circuit by requiring that the petition "*must* be accompanied by a detailed and specific affidavit which shows that the petitioner has actual proof of the allegations going beyond mere unsupported assertions." *Id.* at 1011 (emphasis added).

Scrupulously following the standard enunciated in *Marchibroda*, the Third Circuit, in *Virgin Islands v. Weatherwax*, 20 F.3d 572, 579 (3d Cir. 1994), stated that where it is impossible for the record to "conclusively show" that the petitioner is without relief, a hearing is required. In *Weatherwax*, the petitioner alleged that his counsel was ineffective and he was able to successfully satisfy both prongs of the *Strickland* test showing ineffective assistance of counsel by presenting uncontradicted evidence, via a court

reporter's affidavit, that trial counsel knew a juror had brought a newspaper article mischaracterizing the petitioner's trial testimony into the jury room and had not brought it to the attention of the court. *See id.* at 577; *see also Strickland v. Washington*, 466 U.S. 668, 687-96 (1984).[3] The Third Circuit reasoned that without a hearing it was impossible for the district court to ascertain that the record "conclusively showed" that the petitioner was without relief. *Weatherwax*, 20 F.3d at 579.

A hearing is required in the Fifth Circuit whenever the petitioner makes allegations of ineffective assistance of counsel that are neither vague nor speculative, and that involve questions of fact that could not be resolved by a review of the record or affidavits. *See Clark v. United States*, 606 F.2d 550, 552 (5th Cir. 1979).

The First Circuit, in *United States v. Butt*, 731 F.2d 75, 78 (1st Cir. 1984), held that "[a]n evidentiary hearing is required if the records and files in the case, or an expanded record, cannot conclusively resolve substantial issues of material fact" and show that the petitioner is entitled to no relief.

The Ninth Circuit has articulated a bright-line rule that wherever the petitioner raises "facts which occurred out of the courtroom and off the record," an evidentiary hearing

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[3] To prevail on a Sixth Amendment claim of ineffective assistance of counsel, the petitioner must show counsel's performance was so deficient "that counsel was not functional as the 'counsel' guaranteed the defendant by the Sixth Amendment." *United States v. Teague*, 953 F.2d 1525, 1534 (11th Cir. 1992), quoting *Strickland*. Secondly, the petitioner must show he was prejudiced by counsel's deficient performance, meeting the harmless error rule.

should be granted, "unless something in the record conclusively shows that [the petitioner's] trial attorney was not ineffective." *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989). In *Burrows*, the petitioner alleged that his trial counsel refused to consider an insanity defense despite ample medical evidence pointing to its plausibility. *See id.* at 916. In remanding the case for a hearing, the Ninth Circuit criticized the district court's assumption that the petitioner's attorney must have rejected the insanity defense option for strategic reasons because the record shed no light on the issue. *See id.* at 918. As did the Third Circuit in *Weatherwax*, the court in *Burrows* found that it was impossible to find conclusively without an evidentiary hearing that a claim of ineffective assistance of counsel merited no relief where it was based on matters occurring outside of the record. *See id.*

In *Diamond v. United States*, 432 F.2d 35, 38 (9th Cir. 1970), the Ninth Circuit described the types of claims that warranted an evidentiary hearing. A hearing would be necessary where the record did not conclusively show that counsel's actions were tactical choices, but could have been tactical mistakes. *See id.* at 38. Also, where the "allegations specifically delineate the factual basis for [a] claim," the petitioner would be entitled to a hearing. *Id.* at 37.

Both the Court of Appeals for the District of Columbia Circuit and the District of Puerto Rico apply a similar bright-line rule. *See United States v. Curtis*, 459 F.2d 1362, 1364 (D.C. Cir. 1972) (holding that a hearing is required where it is patently impossible for the court to determine the truth of the petitioner's § 2255 allegations from the record); *United States v. Olivera*, 535 F. Supp. 1058, 1063 (D.P.R. 1982) ("A hearing is required only when the factual allegations contained in the petitioner's motion and

affidavit are contradicted by the affidavit filed with the government's response and relate primarily to purported occurrences outside the courtroom upon which the record can shed no light."). Even the Fourth Circuit Court of Appeals requires a hearing where a § 2255 motion raises a colorable Sixth Amendment claim and material facts are in dispute involving inconsistencies beyond the record. *See United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992).

2. Credibility and Reliability Determinations Necessitate a Hearing

In the case at bar, the district court refused to consider one of the affidavits submitted by the Petitioner stating that it lacked "indicia of reliability." (Pet. App., *infra*, at 18a). In light of the "detailed and specific allegations" set forth in the Petitioner's lengthy § 2255 Motion and his substantial supporting documentation , if the court questioned the reliability of one of the affiants, an evidentiary hearing would have been the appropriate vehicle in which to resolve questions of reliability, credibility and the like. The claims raised in the Petitioner's § 2255 Motion were neither improbable nor unbelievable. In fact, the affidavits of trial counsel submitted by the government supported the Petitioner's claim that he received ineffective assistance at sentencing. As to any of Petitioner's factual allegations which the government disputed based on the affidavits of trial counsel, it was only through an evidentiary hearing that a full and complete record could be made so as to allow the district court to honestly and fairly determine the merits of Petitioner's claims.

### B. The Division in the Federal Circuit Courts of Appeals Should be Resolved in Favor of a Liberal Standard in Light of the Antiterrorism and Effective Death Penalty Act and Its Limitations on the Opportunity to Seek Post-conviction Relief.

Due to the factually-driven nature of any petition brought under 28 U.S.C. § 2255, various courts have stressed the need for the law to allow judges to utilize their common-sense discretion and avoid the articulation of a per se rule regarding the need for an evidentiary hearing. *See Marchibroda*, 368 U.S. at 495 ("The language of [28 U.S.C. § 2255] does not strip the district courts of all discretion to exercise their common sense."); *see also Bryan v. United States*, 492 F.2d 775, 778 (5th Cir. 1974) (stating that it is the task of the courts to "apply judiciously the teachings of *Marchibroda* and *Fontaine*," though no per se rule can be applied); *accord Sanders v. United States*, 373 U.S. 1, 18 (1963); *Kaufman v. United States*, 394 U.S. 217, 226 (1969); *Tucker v. United States*, 427 F.2d 615, n.10 (D.C. Cir. 1970); *Newfield*, 565 F.2d at 207.

Partly because of the fact-intensive, lengthy adjudication of habeas corpus petitions and the public's perception of the abuse of the post-conviction system, the AEDPA included habeas corpus reform when it became law in 1996. *See, e.g.*, President's Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC., 719, 720-21 (Apr. 24, 1996); Ted Gest, *The Law that Grief Built -- Oklahoma Families Help Politicians Get Tough on Murderers*, U.S. NEWS & WORLD REP., Apr. 29, 1996, at 58. Section 105 of the AEDPA amended 28 U.S.C. § 2255 extensively, but perhaps

the most important addition was the final paragraph, which eliminates the possibility of a second or successive § 2255 motion except in the most extreme cases:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain – (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

AEDPA § 105, ¶ 4, 28 U.S.C. § 2255, ¶ 8.

Following the promulgation of the AEDPA, a § 2255 petitioner has essentially one opportunity to seek a post-conviction remedy and reasonably expect the trial court to grant an evidentiary hearing. If the trial court finds that the record "conclusively shows" that the petitioner is not entitled to relief, the petitioner is now precluded from filing a successive § 2255 motion unless it is based either on evidence that, if proven, would absolve the petitioner's guilt by a clear and convincing standard, or it falls under the application of a new rule of constitutional law. While it is not unfathomable that a petitioner may discover new evidence that is favorable and supports a successive § 2255 motion; e.g., a key government witness recants his testimony, it is extremely difficult for the a petitioner to show the court that this new evidence would sufficiently establish the petitioner's innocence to a clear and convincing standard.

The need to ensure finality in criminal cases cannot be

achieved at the expense of constitutional guarantees. The *Marchibroda* Court acknowledged as much when it observed that "arrayed against the interest of finality is the very purpose of the writ of habeas corpus to safeguard a person's freedom from detention in violation of constitutional guarantees." *Marchibroda*, 431 U.S. at 72. *See also Price v. Johnston*, 334 U.S. 266, 269 (1948) (characterizing habeas corpus as our nation's most important constitutional safeguard); *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969) (noting the delicate balance between the interest of finality and the safeguard of constitutional guarantees). The goal of the AEDPA is to provide for an effective death penalty by eliminating all type of habeas corpus petitions that are frivolous or successive. *See* AEDPA, at pmbl. While judicial economy and the elimination of baseless claims are important goals, the integrity of the habeas corpus safeguard should not be unduly compromised.

In order for the integrity of this safeguard to remain intact through the next century and beyond, a more liberal, uniform standard should apply to determine when an evidentiary hearing is mandatory. Due to the significant changes to habeas law made by the AEDPA, this Court should articulate clear standard for determining when a hearing should be required that can be applied uniformly to ensure that the constitutional safeguard of habeas corpus is not eroded to the point of a mere formality. Certiorari should be granted in this case so that the Court can revisit the standard enunciated in *Marchibroda* and impose upon the lower courts the requirement to hold an evidentiary hearing where, as in this case, the pleadings contain detailed and specific allegations, supported by affidavits describing factual matters that occurred outside the courtroom, and contradictory affidavits are submitted by the government. Now that prisoners have just "one bite at the apple" to seek

post-conviction relief, fairness requires that they be given a full opportunity to prove their allegations. The need to do so is made even more apparent in light of the fact that the ability to file successive § 2255 motions has been severely curtailed and that there can be no review of the district court's denial of a habeas petition unless a certificate of appealability is issued and the petitioner can show that he has raised a substantial constitutional issue.

## II ONCE IT IS ESTABLISHED THAT TRIAL COUNSEL'S REPRESENTATION AT SENTENCING FELL BELOW THE *STRICKLAND* OBJECTIVE STANDARD OF REASONABLENSS, IT IS IMPERMISSIBLE FOR THE ORIGINAL SENTENCING JUDGE TO DISMISS A MOTION UNDER 28 U.S.C.§ 2255 CLAIMING INEFFECTIVE ASSISTANCE BASED ON THE JUDGE'S ASSERTION THAT HE WOULD HAVE IMPOSED THE SAME SENTENCE.

The Petitioner was sentenced under the law in effect prior to the enactment of the United States Sentencing Guidelines. *See generally*, The Sentencing Reform Act of 1984, 28 U.S.C. § 994. Under the law in effect at the time of the Petitioner's sentencing, the district court could not permissibly neglect individual sentencing factors and impose a severe sentence merely to effectuate a perceived law enforcement policy. *See United States v. Guglielmi*, 929 F.2d 1001, 1005 (4th Cir. 1991) (holding that the defendant being sentenced was entitled to the judge's "unfettered and unset deliberation"); 18 U.S.C. § 3661; *see also Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) (holding that state cannot preclude the sentencing court from considering relevant mitigating evidence); *Payne v. Tennessee*, 501 U.S.

808, 822 (1991) (stressing that the defendant must be treated as a "uniquely individual human being").

If the sentencing court failed to exercise its discretion in a meaningful way because it concentrated solely on the crime and *not* the offender, the defendant was entitled to have his sentence vacated. *See Guglielmi*, 929 F.2d at 1006-07 (stating that "a rigid sentencing policy based solely on the crime with which the defendant is charged is under no reasonable conception an exercise of judicial discretion") (quoting *United States v. Ingram*, 530 F.2d 602, 603 (4th Cir. 1976)). The law required that deterrence be "tempered" by the court's duty to individualize the sentence. *Guglielmi*, 929 F.2d at 1006. Furthermore, the failure to individualize a sentence constituted a violation of a defendant's right to due process of law. *See United States v. Wardlaw*, 576 F.2d 932, 937-38 (1st Cir. 1978) (holding that failure to individualize a defendant's sentence constitutes an abrogation of the court's sentencing responsibility).

### A. The Petitioner Established that his Counsel's Representation Fell Below the Objective Standard of Reasonableness.

The Petitioner's attorneys gave the court no information, nor offered any argument, in support of a sentence tailored to the individual being sentenced. They simply presupposed that the court would give the petitioner the maximum sentence since he was not cooperating with the government. (Pet. App., *infra*, at 86a). The court did not disappoint. The Petitioner raised this constitutional deprivation in his § 2255 Motion. His attorney submitted an affidavit, attached to the Government's Answer, in which he acknowledged the accuracy of this claim. The court held that, since it would not have given the Petitioner any sentence less

than the maximum, the Petitioner failed to meet the second prong of *Strickland*. (Pet. App., *infra*, at 16a).

A court cannot carry out its constitutionally required task if defense counsel fails to provide the court with any facts. In this case, trial counsel had at their disposal extensive and compelling information about the Petitioner, including his impressive family history, his employment record, his lack of violence, his community involvement, his strong reluctance, based upon the childhood trauma of his family's persecution by the Castro government, as well as religious convictions, to testify against anyone else for his own personal benefit, his exemplary compliance with an earlier probationary sentence, and his lack of any criminal behavior and his sincere efforts to reform his way of life during the almost four years preceding his arrest on the indictments leading to his convictions in this case. It is impossible to know what the trial court would have done if, at the time of sentencing, it had been presented with the information that was available so that the Petitioner could have had the individualized sentence to which he was entitled. While it might be understandable for trial counsel to presuppose that the court would sentence the Petitioner to the maximum simply because of the crime, to fail to provide the court with the available information necessary to individualize that sentence to fit the Petitioner is indefensible.

### B. The Rationale of *Santobello v. New York* Should Apply to Preclude the Original Sentencing Judge From Finding that the Constitutional Failings of Counsel did not Influence his Sentencing Decision.

In *Santobello v. New York*, 404 U.S. 257 (1971), the prosecution breached its agreement to make no sentence recommendation and the sentencing judge stated that it would have given the defendant the same sentence regardless of any agreement by the prosecution. This Court held that the fact that the trial court stated that it would have given the defendant the same sentence even if the prosecutors had not violated the plea agreement required a remand to the state court to determine:

> whether the circumstances of this case require only that there be specific performance of the agreement on the plea, *in which case petitioner should be resentenced by a different judge*, or whether, in view of the state court, the circumstances require granting the relief sought by petitioner, i.e., the opportunity to withdraw his plea of guilty.

*Santobello*, 404 U.S. at 263.

The rationale that applied in *Santobello* to require a resentencing before a new judge ought to apply in a situation, such as the one presented herein, where a § 2255 motion demonstrates that, due to the ineffective assistance of counsel, the sentencing judge disregarded the Petitioner's

constitutional right to an individualized sentence. Under circumstances where the sentencing judge denies the § 2255 motion based upon his assertion that his sentence would have been the same regardless of whether the petitioner's trial counsel was ineffective, due process and principles of fundamental fairness require that, as in *Santobello*, the Petitioner be resentenced by a different judge.

The Petitioner recognizes that § 2255 contemplates that a motion made pursuant to that section be presented to the judge who presided over the original conviction and sentencing. However, it is abundantly clear from the district court's summary denial of his claim of ineffective assistance at sentencing, in the face of trial counsel's admission that they presented no, nor argued any, mitigating circumstances based upon their belief that the judge would impose the maximum sentence, that a different judge should have considered the Petitioner's claim.

In this case, it makes no difference whether the sentencing judge would have ignored any mitigating circumstances as trial counsel assumed or the sentencing judge would have considered mitigating circumstances had trial counsel presented them. In either case, a constitutional violation occurred. In order "to preserve the appearance of justice," the Petitioner is entitled to have a new hearing before a different judge. *See United States v. Ferguson*, 624 F.2d 81, 83 (9th Cir. 1980) (holding that "[t]he original judge's steadfast refusal to consider any sentence other than the maximum, in violation of the defendant's constitutional rights, suggests that the appearance of justice would be ill served if" the case is remanded to the same judge).

## CONCLUSION

For the aforementioned reasons, the Petitioner respectfully requests that this Court grant a writ of certiorari.

Respectfully submitted,

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*Counsel of Record*

January 22, 1997

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 98-7055

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUSTO ENRIQUE JAY,

Defendant-Appellant.

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**No. 98-7215**

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUSTO ENRIQUE JAY,

Defendant-Appellant.

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Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, Senior District Judge. (CR-88-20-C, CR-88-21, CA-97-202-P)

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Submitted: October 8, 1998 Decided: October 27, 1998

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Before WIDENER, NIEMEYER, and MICHAEL, Circuit Judges.

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Dismissed by unpublished per curiam opinion.

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William F.W. Massengale, MASSENGALE & OZER, Chapel Hill, North Carolina; John Kenneth Zwerling, ZWERLING & KEMLER, Alexandria, Virginia, for Appellant. Kenneth Davis Bell, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellant seeks to appeal the district court's order denying his motions filed under 28 U.S.C. § 2255 (1994) and 28 U.S.C. § 1651 (1994) and the district court's order denying Appellant's motion to issue a certificate of appealability. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we deny a certificate of appealability and dismiss the appeal on the reasoning of the district court. United States v. Jay, Nos. CR-88-20-C; CR-99-21; CA-97-202-P (W.D.N.C. May 12 & July 21, 1998). We therefore dismiss Appellant's appeal of the district court's order denying his motion to issue a certificate of appealability as moot. We dispense with oral argument because the facts and

legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT**
**OF NORTH CAROLINA**
**CHARLOTTE DIVISION**

**3:97CV202-P**
**(C-CR-88-20-P & C-CR-88-21-P)**

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| **JUSTO JAY,** | ) | |
| | ) | |
| **Petitioner,** | ) | |
| **vs.** | ) | **ORDER** |
| | ) | |
| **UNITED STATES OF AMERICA,** | ) | |
| | ) | **(Filed 4/29/97)** |
| **Respondent.** | ) | |
| | ) | |

**THIS MATTER** is before the undersigned on Petitioner's Motion to Vacate, Set Aside or Correct Sentence under Title 28, United States Code, Section 2255, and Petition for Writ of Coram Nobis, filed on April 21, 1997.

In the Motion, Petitioner attacks his convictions and sentences in C-CR-88-20-P and C-CR-88-21-P alleging numerous claims.

After careful review of the motion and the case file, the undersigned finds that the United States Attorney should file an Answer to Petitioner's allegations.

**IT IS, THEREFORE, ORDERED** that the United States Attorney shall file an Answer to Petitioner's Motion to Vacate, Set Aside, or Correct Sentence not later than **June 13, 1997**.

The Clerk is directed to certify copies of this Order to

Petitioner, Petitioner's counsel, the United States Probation Office, and the United States Attorney.

**This the 29th day of April, 1997.**

/s/
**ROBERT D. POTTER**
**SENIOR UNITED STATES**
**DISTRICT JUDGE**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT**
**OF NORTH CAROLINA**
**CHARLOTTE DIVISION**

**3:97CV202-P**
**(C-CR-88-20-P)**
**(C-CR-88-21-P)**

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| **JUSTO JAY,** | ) | |
| | ) | |
| **Petitioner,** | ) | |
| **vs.** | ) | **JUDGMENT** |
| | ) | |
| **UNITED STATES OF AMERICA,** | ) | |
| | ) | **(Filed 5/12/98)** |
| **Respondent.** | ) | |
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In accordance with the Order filed simultaneously with this Judgment, **IT IS ORDERED, ADJUDGED, AND DECREED** that Petitioner's 28 U.S.C. §2255 Petition and 28 U.S.C. §1651 Petition be, and hereby are, **DISMISSED WITH PREJUDICE**.

**This the 11th day of May, 1998.**

**/s/**
**ROBERT D. POTTER**
**SENIOR UNITED STATES**
**DISTRICT JUDGE**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT**
**OF NORTH CAROLINA**
**CHARLOTTE DIVISION**

**3:97CV202-P**
**(C-CR-88-20-P)**
**(C-CR-88-21-P)**

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| **JUSTO JAY,** | ) | |
| | ) | |
| **Petitioner,** | ) | |
| **vs.** | ) | **ORDER** |
| | ) | |
| **UNITED STATES OF AMERICA,** | ) | |
| | ) | **(Filed 5/12/98)** |
| **Respondent.** | ) | |
| | ) | |

**THIS MATTER** is before the Court on the Petitioner's Motion to Vacate Convictions and Sentence pursuant to 28 U.S.C. §2255 [Document 1-1] and Petitioner's Petiton for Coram Nobis [Document 1-2]. Finding that Petitioner has failed to establish any basis for relief, pursuant to either 28 U.S.C. §2255 or 28 U.S.C. §1651, the Court will dismiss Petitioner's §2255 Petition and §1651 Petition.

**1. Factual Background and Procedural History**

The relevant facts of this case are not in dispute. The Petitioner was indicted February 2, 1988 by two different federal grand juries, both sitting in the Western District of North Carolina. The first, a single count indictment, charged Petitioner with operating a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. §848. The second, which was subsequently superseded on March 9, 1988, charged Petitioner with conspiracy to possess with intent to distribute

cocaine in violation of 21 U.S.C. §846 and possesion with intent to distribute and distribution of cocaine in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. The Petitioner was tried before a jury and convicted on all counts in each indictment, a nd sentenced to a life sentence without parole as well as a 115 year term of incarceration to be served concurrently with the life sentence. The Court of Appeals for the Fourth Circuit, while affirming Petitioner's convictions, the life sentence, and sentences which totaled 105 years, vacated a ten year sentence on his conspiracy conviction on September 21, 1989. Petitioner subsequently filed a Petition for Writ of Certiorari to the United States Supreme Court, which was denied on March 19, 1990. Petitioner filed the instant Motion to Vacate Convictions and Sentence pursuant to 28 U.S.C. §2255 and Petition for Writ of Coram Nobis pursuant to 28 U.S.C. §1651 on April 21, 1997. On September 23, 1997, the Government filed a Response to Petitioner's Motion to Vacate and Petition for Coram Nobis, to which Petitioner replied on January 15, 1998. This matter is now ripe for consideration.

In his §2255 Petition, Petitioner claims that aiding and abetting cannot be a basis for CCE culpability, that there was o evidence that he was a kingpin within the statute of limitations for §848, that he received ineffective assistance of counsel, that the verdict was affected by improper remarks by the prosecution in closing argument, and that reasonable doubt exists as to his guilt in light of clarification by the Government's primary witness of his testimony.

**II. Evidentiary Hearing**

Petitioner contends that he is entitled to an evidentiary hearing to fully and completely resolve the issues presented in his Petition. A hearing is required in a habeas corpus proceeding unless the motion, files, and records of the case conclusively show that a petitioner is entitled to no relief. *Fontaine v. United States*, 411 U.S. 213, 215 (1973); *Kaufman*

*v. United States*, 394 U.S. 217 (1969); *United States v. Yearwood*, 863 F.2d 6 (4th Cir. 1988).

Contrary to Petitioner's assertions, the issues raised within his Petition do not contain disputes of material facts with inconsistencies beyond the record generated during his trial. Based upon a thorough review of the record, including all motions, files, and transcripts included therein, as well as the relevant case law, the Court finds that such review conclusively shows that Petitioner is entitled to no collateral relief. Accordingly, the Court will deny Petitioner's request for an evidentiary hearing on this matter.

**III. Motion to Vacate Convictions and Sentence**

**A. Insufficient Basis for CCE Culpability**

Petitioner claims that his conviction of operating a continuing criminal enterprise must be vacated because aiding and abetting cannot be a basis for CCE culpability. Petitioner raised this claim before the Fourth Circuit, which rejected it noting that the evidence presented at trial established that Petitioner was one of the leaders of a major drug distribution network operating on the eastern coast of the United Sates from as early as 1979 and continuing through 1984. *United States v. Jay*, No. 88-5635, at 7-8 (4th Cir. September 21, 1989).

A petitioner is generally barred from collaterally attacking issues raised and addressed on direct appeal, *Boechenhaupt v. United States*, 537 F.2d 1182 (4th Cir.), *cert. denied*, 429 U.S. 863 (1976), and may raise them only if he did not have a full and fair opportunity to litigate them on direct appeal, or if there has been an intervening change in the law. *Stone v. Powell*, 428 U.S. 465 (1976); *Davis v. United States*, 417 U.S. 333 (1974). As Petitioner did have a full and fair opportunity to litigate this issue on direct appeal, and there has been no intervening change in the law, the Court finds that

Petitioner is barred fro raising the issue in this proceeding.

**B. Ineffective Assistance of Counsel**

Petitioner claims that his counsel failed to provide effective assistance by failing to preserve Petitioner's right to testify, failing to know and utilize existing and emerging case law, failing to make competent opening remarks, incompetently cross-examining the key Government witness, incompetently cross-examining other witnesses, and failing to make competent closing arguments. Petitioner further contends that because counsel had interviewed the key Government witness and was aware of that witness' inconsistent statements, a conflict of interest was created in that defense counsel could have testified as an impeachment witness.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, L.Ed. 3d 674 (1984), the Supreme Court announced a two prong test for evaluating a lawyer's effectiveness. First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 687-88, 104 S.Ct. At 2064-65. In this regard, the Supreme Court made it clear that there is a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance and that judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689, 104 S.Ct. at 2065; *United States v. Williams*, 106 F.3d 1173, 1176 (4th Cir. 1997); *Fields v. Attorney General of Maryland*, 956 F.2d 1290, 1297-99 (4th Cir. 1992).

Second, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, S.Ct. at 2068. These two components are typically referred to as the "performance" and "prejudice" components. *Id.* at 698, S.Ct. at 2070. The

defendant bears the burden of proving *Strickland* prejudice. See *Hutchins v. Garrison*, 724 F.2d 1425, 1430-31 (4th Cir. 1983), *cert. denied*, 464 U.S. 1065, 104 S.Ct. 750, 79 L.Ed. 2d 207 (1984). After carefully reviewing the case file and the transcripts of the trial, the Court finds that Petitioner's claim is without merit.

**1. Right to Testify**

Petitioner claims that counsel failed in their duty to preserve his right to testify by failing to reassess their initial decision to keep him off the witness stand in light of the progression, failing to seriously consider his testimony to be a viable option at trial to counter the Government's evidence and failing to explain to Petitioner his absolute right to testify, consult with him prior to trial regarding his right to testify, or consult further with him during the trial about his right to testify. Petitioner further contends that he was unaware that the decision whether to testify or not was his to make, and not that of his attorneys.

A strategic decision by a defense attorney not to put his client on the stand will not amount to ineffective representation by the attorney when the decision is reasonable. *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114 (1987); *Hutchins v. Garrison*, 724 F.2d 1425, 1436 (4th Cir. 1983), *cert. denied*, 464 U.S. 1065 (1984); *United States v. Martinez*, 883 F.2d 750 755 (9th Cir. 1989). Quite obviously, an experienced trial attorney can properly decide not to put a defendant in a position where he would be subject to cross-examination that might literally be fatal. *Id.*; *Burger* 107 S.Ct. at 3124.

In his affidavit, Petitioner's trial counsel, Mr. James F. Wyatt, III, states that given the facts of the case, there was no real issue whether Petitioner would testify and that both he and co-counsel agreed that it would be greatly against his interest for him to testify. (Wyatt, Aff. ¶¶13). Counsel notes that the

Government had made a plea offer which was rejected by the Petitioner and that he had testified he would have been required to undergo cross-examination or face contempt charges, would have severely damaged his credibility as a witness had he denied any association with co-indictees, would have had to severely compromise his defense by being subject to cross-examination about his activities which occurred within the statute of limitations for prosecution, and would have had to admit to drug dealing during the limitations period. (Wyatt, Aff. ¶13, 14). The strategic decision made by counsel not to put Petitioner on the stand, far from amounting to ineffective assistance, was clearly reasonable and effective.

**2. Failure to Know and Utilize Existing and Emerging Case Law**

Petitioner claims that at the time of his trial, case law existed that held that aiding and abetting could not be used as a predicate felony for purposes of CCE culpability, that cousel was unaware of this relevant case law which would have provided a basis for a judgment of acquittal under Rule 29 of the Federal Rules of Evidence, and that counsel failed either to use such case law as a basis for dismissing the charges against him or to argue that, at the very least, aiding and abetting should be considered as a mitigating factor for purposes of sentencing.

A tactical error or failure to raise objection must be incompetent and prejudicial in order to give rise to an ineffective assistance claim. *Fitzgerald v. Thompson*, 943 F.2d 463 (4th Cir. 1991), *cert. denied*, 502 U.S. 1112, 112 S.Ct. 1219 (1992). A district court reviewing counsel's trial tactics on collateral review should not conjure up tactical decisions that an attorney could have made, but plainly did not. *Griffin v. Warden, Md.Correctional Adjustment Ctr.*, 970 F.2d 1355 (4th Cir. 1992).

As discussed above, Petitioner argued that his status as an aider and abettor did not establish CCE culpability before the Fourth Circuit, which rejected it noting that the evidence presented at trial established that Petitioner was one of the leaders of a major drug distribution network operating on the eastern coast of the United States from as early as 1979 and continuing through 1984. A tactical decision by counsel not to raise this argument was neither incompetent nor prejudicial.

### 3. Incompetent Opening and Closing Statements

Petitioner claims that counsel obfuscated the issues when his opening statement failed to directly inform the jury that he was innocent and failed to educate the jury as to the theory of defense. Petitioner further claims that counsel presented no serious challenge or rebuttal to the Government's assertion that he allegedly aided and abetted the true leader of the CCE by supplying him with cocaine, failed to understand and argue that his role in the CCE was legally insufficient to establish CCE culpability with the statute of limitations, and failed to argue that he had withdrawn from the conspiracy.

As discussed above, *Strickland* requires a petitioner to demonstrate a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. In light of the evidence which supports the verdict, as well as the weakness of Petitioner's claims that he was involved in the CCE as an aider and abettor, rather than as a kingpin, the Court cannot conclude that the result of these proceedings would have been different had counsel presented opening and closing remarks consistent with Petitioner's legal theories, which have already been rejected by the Fourth Circuit as meritless. As Petitioner has failed to satisfy the prejudice prong of *Strickland*, no further analysis of counsel's opening and closing statements in order to determine competency is required.

**4. Incompetent Cross-Examination**

Petitioner alleges the counsel failed to challenge the only Government witness who alleged Petitioner was involved in the 14 substantive counts. Specifically, Petitioner contends that when Arsenio Diaz testified that Petitioner was the only source for cocaine up until 1984, he provided no basis upon which to make such an absolute statement and that counsel had a duty to attack and undermine the basis for this assertion in order to show the jury that the statement was based on nothing more than speculation or was unreliable hearsay or was simply a misstatement and, as such, should not be considered as reliable evidence.

Petitioner further contends that counsel's sole trial tactic was a formidable but futile assault upon the veracity of each Government witness, that counsel conducted cross-examination with blinders on, in that even those witnesses who had testified favorably for Petitioner were attacked as untrustworthy, and that cross-examination was convoluted and needlessly prolonged so the jury was likely confused and unable to focus upon the basic fact that each of six Government witnesses had not disputed his innocence of the substantive offenses.

The Supreme Court, in *Strickland*, articulated a highly deferential standard for reviewing the reasonableness of a counsel's performance, recognizing the inherent difficulties in evaluating a performance through the distorting effects of hindsight. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. The Supreme Court's instruction to presume that a counsel's assistance is effective is especially true with respect to tactical decisions made by counsel at trial such as the handling of witnesses which are especially vulnerable to criticism when removed from the context of a hotly contested litigation. Hutchins v. Garrison, 724 F.2d 1425, 1436 (4th Cir. 1983), *cert. denied*, 464 U.S. 1065, 104 S.Ct. 750 (1984); *Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978), *cert. denied*, 441

U.S. 911, 99 S.Ct. 2009 (1979). Where a trial counsel conducts a thorough and meaningful cross-examination of a witness, counsel's failure to employ a trail strategy that, in hindsight, might have been more effective, does not constitute unreasonable performance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Cardwell v. Netherland*, 971 F. Supp. 997, 1019 (E.D. Va. 1997).

Although Petitioner contends that his trial counsel chose a trial strategy which is inconsistent with the strategy which he would employ at this time, ostensibly through his habeas counsel, he has failed to allege that trial counsel failed to conduct a thorough and meaningful cross-examination of any Government witnesses. Rather, he claims that counsel employed a "formidable but futile assault upon the veracity of each government witnesses." Employment of such a strategy by trial counsel does not constitute unreasonable performance.

**5. Conflict of Interest**

Petitioner claims that trial counsel James Wyatt, III interviewed Diaz on two occasions prior to Diaz' becoming a Government witness, that Diaz did not tell Wyatt that Petitioner was the only source of cocaine for the CCE up until 1984 and that Petitioner did not sell any cocaine for the CCE after 1982, that Diaz made these statements during his lengthy cross-examination of Diaz, and that these inconsistent statements created a conflict of interest in that Wyatt could have testified as an impeachment witness.

As described above, the strategy employed by counsel during cross-examination was not unreasonable. Further, Petitioner's assertion that a trial counsel is obliged to rescue himself whenever a witness provides trial testimony which is inconsistent with prior statements taken in pre-trial interviews and make himself as an impeachment witness is wholly without precedent or merit.

### 6. Ineffective at Sentencing Hearing

Petitioner claims that counsel failed to correct numerous errors in the Presentence Investigation Report, neglected case law and crucial legal arguments which needed to be raised on Petitioner's behalf, incorrectly implied that Petitioner did not testify because he would have needed to perjure himself, failed to present witnesses and documents to guide the Court in fashioning an appropriate sentence, failed to advise Petitioner regarding both the inclusion of his own version of the offense in the written PSR and as to the oral remarks he made at the hearing, and failed to argue that aiding and abetting liability on a CCE conviction had been recognized as a factor to be taken into account as a mitigating factor for sentencing purposes.

As discussed above, *Strickland* requires a petitioner to demonstrate a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. As discussed above, the Fourth Circuit affirmed Petitioner's convictions and sentences, other than a ten year sentence on his conspiracy conviction. Petitioner also filed, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, a Motion for Reduction of Sentence. Although Petitioner was represented by new counsel, and raised all of the issues presented in the instant §2255 Petition, Petitioner received the same sentence, which was again upheld by the Fourth Circuit on appeal. As Petitioner has failed to satisfy the prejudice prong of *Strickland*, no further analysis of counsel's representation during sentencing in order to determine competency is required.

### 7. Improper Admission of Marijuana Conviction

Petitioner claims that although he was charged with operating a continuing criminal enterprise which supplied cocaine to individuals in North Carolina, he was not charged

with being part of a marijuana distribution enterprise, that he was not named in two counts of the superseding indictment which charged other indictees with marijuana distribution, and that the Court committed error when it allowed the prosecution to introduce a 1981 conviction wherein Petitioner pled guilty to offloading marijuana in Louisiana.

Petitioner fails to allege, let alone show, in what way the admission of his prior conviction is the result of ineffective assistance of counsel. Indeed, counsel objected to the admission. Further, Petitioner fails to demonstrate a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different as required by *Strickland*. Accordingly, the Court finds Petitioner's claim without merit.

After thoroughly reviewing the record in this matter, including transcripts of the trial and sentencing hearing, as well as Petitioner's §2255 Petition, the Court finds that Petitioner's myriad claims concerning counsel's ineffective assistance, during either trial or sentencing, are without merit.

**C. Improper Remarks by Prosecution During Closing Arguments**

Petitioner claims that during various times throughout the trial, the prosecutor indicated Diaz's crucial testimony was corroborated, and that those statements were an inaccurate summary of trial testimony and an inappropriate summation of the Government's case against Petitioner.

It is well settled that a petitioner may not raise non-constitutional claims in collateral proceedings if those claims could have been raised on direct appeal but were not. *Stone v. Powell*, 428 U.S. 465, 477 n. 20, 96 S.Ct. 3037, 3044 n. 10 (1976); *United States v. Emanuel*, 869 F.2d 795 (4th Cir. 1989). As Petitioner failed to raise the issue of improper statements by

the Government on direct appeal, he is precluded from doing so collaterally.

**D. Clarification of Testimony by Key Government Witness**

Petitioner claims that Arsenio Diaz, the primary Government witness against him, has made out of court statements admitting that the portion of his trial testimony wherein he stated that Petitioner was the sole supplier of cocaine for the CCE in 1983 and 1984 is inaccurate and misleading and will so testify at a hearing on this motion, that Diaz has stated that his trial testimony was contrary to other information known both to him and the Government in 1988 and that an effective cross-examination by defense counsel would have corrected the statements, and that the Petitioner cannot be found guilty beyond a reasonable doubt.

A new trial should be granted on the basis of a witness' recanted testimony when the court is reasonably well satisfied that the testimony given by a material witness is false, that without that false testimony the jury might have reached a different conclusion, and that the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know if its falsity until after the trial. *United States v. Wallace*, 528 F.2d 863, 866 (4th Cir. 1976); *Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir. 1982).

The affidavit given by Martinez fails to give any indica of reliability whatsoever. Neither Martinez nor Petitioner identifies who Martinez is, on what occasions he spoke with Diaz, where these alleged conversations took place, or why Diaz made the statements to Martinez. As succh, the Court is far from satisfied that the information presented in the affidavit is reliable, and is not reasonably satisfied that the testimony given by Diaz during the trial is false. Further, Petitioner fails

to allege, let alone demonstrate, that he was taken by surprise when Diaz testified, that he was unable to meet such testimony, or that he did not know of its falsity until after the trial. Accordingly, Petitioner's argument that the Court should grant a new trial on the basis of recanted testimony is wholly without merit.

## IV. Petition for Writ of Coram Nobis

Petitioner apparently seeks relief under 28 U.S.C. §1651(a) as well as under §2255. Federal courts may grant a writ of coram nobis to vacate a conviction even after the sentence has been served by a petitioner where fundamental error occurred and no other remedy is available. *United States v. Morgan*, 346 U.S. 502 (1954); *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989); *United States v. Shamy*, 886 F.2d 743 (4th Cir. 1989).

As discussed above, no fundamental error occurred during Petitioner's trial. Further, Petitioner has availed himself of 28 U.S.C. §2255, thus precluding relief under §1651. Accordingly, the Court will deny Petitioner's §1651 Petition.

## V. Conclusion

Petitioner has failed to set forth any grounds upon which this Court may grant him relief. He has failed to demonstrate that there was an insufficient basis for CCE culpability, that the representation which he received from his counsel was either ineffective or prejudicial, that he is entitled to a new trial on the basis of recanted testimony by a material witness, or that he is entitled to relief pursuant to 28 U.S.C. §1651. Accordingly, the Court will deny Petitioner's §2255 Petition and §1651 Petition.

**NOW, THEREFORE, IT IS ORDERED** that Petitioner's §2255 Petition [Document No. 1-1] be, and hereby is, **DENIED**.

**IT IS FURTHER ORDERED** that Petitioner's §1651 Petition [Document No. 1-2] be, and hereby is, **DENIED**.

**IT IS FURTHER ORDERED** that Petitioner's Motion for Disclosure of Grand Jury Testimony [Document No. 2] is hereby **DENIED AS MOOT**.

The Court will simultaneously file a separate judgment dismissing the Petitioner's §2255 Petition with prejudice.

The Clerk is directed to certify copies of this order to Petitioner, Petitioner's counsel, and the United States Attorney for the Western District of North Carolina.

**This the 11th day of May, 1998.**

/s/
**ROBERT D. POTTER**
**SENIOR UNITED STATES**
**DISTRICT JUDGE**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT**
**OF NORTH CAROLINA**
**CHARLOTTE DIVISION**

**3:97CV202-P**
**(C-CR-88-20-P)**
**(C-CR-88-21-P)**

| | | |
|---|---|---|
| **JUSTO JAY,** | ) | |
| | ) | |
| **Petitioner,** | ) | |
| **vs.** | ) | **ORDER** |
| | ) | |
| **UNITED STATES OF AMERICA,** | ) | |
| | ) | **(Filed 5/28/98)** |
| **Respondent.** | ) | |
| | ) | |

**THIS MATTER** is before the Court on Petitioner's Motion to Reconsider. Finding Petitioner's Motion to be without merit, the Court will deny it.

This Court denied Petitioner's Motion to Vacate Convictions and Sentence pursuant to 28 U.S.C. §2255 on May 11, 1998. Petitioner now moves the Court to reconsider the portion of its Order which rejects claim relating to the need for a hearing regarding the clarified/recanted testimony of Arsenio Diaz, and the portion of this Order which finds that Petitioner was effectively represented at sentencing.

Rule 60(b) of the Federal Rules of Civil Procedure provides that a court may relieve a party from a final judgment, order, or other proceeding. In pertinent part, Rule 60(b) provides relief for:

(1) mistake, inadvertence, surprise, of excusable

> neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentations, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated...; or (6) any other reason justifying relief from the operation of the judgment.

In his Motion, Petitioner is merely attempting to reargue his claims and contentions which were raised in his Motion to Vacate Convictions and Sentence. Accordingly, the Court finds that Petitioner has not shown that he is entitled to relief pursuant to Rule 60(b) and will deny Petitioner's Motion.

**NOW, THEREFORE, IT IS ORDERED** that Petitioner's Motion to Reconsider be, and hereby is **DENIED**.

**This the 28th day of May, 1998.**

/s/
**ROBERT D. POTTER**
**SENIOR UNITED STATES**
**DISTRICT JUDGE**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

| | |
|---|---|
| UNITED STATES OF AMERICA | ) DOCKET NO. |
| | ) C-CR-88-20 |
| VS. | ) Vio: Title 21 USC |
| | ) §848 |
| JUSTO ENRIQUE JAY | ) (Filed 2/2/88) |

THE GRAND JURY CHARGES:

COUNT ONE

That from in or about the fall of 1978 and continuing thereafter up to and including the fall of 1984, in the Western District of North Carolina, and elsewhere, the defendant,

JUSTO ENRIQUE JAY

knowingly, wilfully and intentionally did engage in a continuing criminal enterprise, and that he violated Title 21, United States Code, Section 841, 846, 952 and 963 by doing, causing, facilitating, and aiding and abetting the importation, possession with intent to distribute, and distribution of cocaine, a Schedule II narcotic controlled substance, and which violations were a part of a continuing series of violations undertaken by defendant, JUSTO ENRIQUE JAY, in concert with at least five other persons with respect to who defendant JUSTO ENRIQUE JAY, occupied a position of organizer, a supervisory position, a position of management, and from which defendant, JUSTO ENRIQUE JAY, obtained substantial income and resources in violation of Title 21, United States Code, Section 848.

/s/
Foreman

/s/
Thomas J. Ashcraft
United States Attorney

/s/
Kenneth D. Bell
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

| | |
|---|---|
| UNITED STATES OF AMERICA | ) DOCKET NO. |
| | ) C-CR-88-21 |
| VS. | ) Vio: Title 21 USC |
| | ) §846 |
| JUSTO ENRIQUE JAY, | ) Vio: Title 21 USC |
| FERNANDO LOPEZ and | ) §841(a)(1) |
| ALBERTO DIAZ, also known as | ) |
| MARK DIAZ, also known as MARK | ) (Filed 3/9/88) |
| MARUSO, also known as MOOSE | ) |

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

That in or about the fall of 1978, and continuously thereafter, until in or about the fall of 1984, within the Western District of North Carolina and elsewhere,

JUSTO ENRIQUE JAY,
FERNANDO LOPEZ,
ALBERTO DIAZ, also known as MARK DIAZ,
also known as MARK MARUSO, also known as MOOSE

Mark Douglas Morningstar, Ronald Eugene Church, Charles Michael Best and others, did knowingly, unlawfully and wilfully combine, confederate and agree with one another and others, both known and unknown to the Grand Jury, to unlawfully possess with intent to distribute and distribute in excess of one kilogram of cocaine, a Schedule II narcotic controlled substance, a violation of Title 21, United States Code, Section

841(a)(1), in violation of Title 21, United States Code, Section 846.

## OBJECTS OF THE CONSPIRACY

It was the object of the conspiracy to transport marijuana and cocaine from Miami, Florida to Charlotte, North Carolina and thereafter, by means of the establishment of narcotic distribution networks and franchises, to distribute said marijuana and cocaine in Charlotte, North Carolina and elsewhere within the Western District of North Carolina.

## OVERT ACTS

In furtherance of the conspiracy, the above named individuals committed the following overt acts:

1. At all times pertinent to the conspiracy, JUSTO ENRIQUE JAY and FERNANDO LOPEZ of Miami, Florida supplied multiple kilogram quantities of cocaine on a regular basis to Mark Douglas Morningstar, Ronald Eugene Church and Charles Michael Best for transportation to and distribution in the Western District of North Carolina.

2. Throughout the period of the conspiracy, Mark Douglas Morningstar, Ronald Eugene Church and Charles Michael Best established, organized, supervised, managed and supplied cocaine distribution organizations in the Western District of North Carolina.

3. On several occasions during the course of the conspiracy, ALBERTO DIAZ, also known as Mark Diaz, also known as Mark Maruso, also known as Moose, drove multiple kilogram quantities of cocaine from JUSTO ENRIQUE JAY and FERNANDO LOPEZ in Miami, Florida to Mark Douglas Morningstar, Ronald Eugene Church and Charles Michael Best in the Western District of North Carolina.

## COUNT TWO

That in or about March, 1983, in the Western District of North Carolina,

JUSTO ENRIQUE JAY,
FERNANDO LOPEZ, and

Ronald Eugene Church did knowingly, wilfully and unlawfully possess with intent to distribute and did aid and abet one another in the possession with intent to distribute in excess of one kilogram of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

## COUNT THREE

That in or about March 1983, in the Western District of North Carolina,

JUSTO ENRIQUE JAY,
FERNANDO LOPEZ and

Ronald Eugene Church did knowingly, wilfully and unlawfully distribute, and did aid and abet each other in the distribution of in excess of one kilogram of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

## COUNT FOUR

That in or about mid April 1983, in the Western District of North Carolina,

JUSTO ENRIQUE JAY,
FERNANDO LOPEZ and

Mark Douglas Morningstar did knowingly, wilfully and unlawfully possess with intent to distribute and did aid and abe one another in the possession with intent to distribute in excess of one kilogram of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT FIVE

That in or about mid April 1983, in the Western District of North Carolina,

JUSTO ENRIQUE JAY,
FERNANDO LOPEZ and

Mark Douglas Morningstar did knowingly, wilfully, and unlawfully distribute, and did aid and abet each other in the distribution of in excess of one kilogram of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT SIX

That in or about early June 1983, in the Western District of North Carolina,

JUSTO ENRIQUE JAY,
FERNANDO LOPEZ and

Mark Douglas Morningstar did knowingly, wilfully and unlawfully possess with intent to distribute and did aid and abet one another in the possession with intent to distribute in excess of one kilogram of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT SEVEN

That in or about early June 1983, in the Western District of North Carolina,

JUSTO ENRIQUE JAY,
FERNANDO LOPEZ and

Mark Douglas Morningstar did knowingly, wilfully and unlawfully distribute, and did aid and abet each other in the distribution of in excess of one kilogram of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT EIGHT

That in or about mid July 1983, in the Western District of North Carolina,

JUSTO ENRIQUE JAY,
FERNANDO LOPEZ and

Mark Douglas Morningstar did knowingly, wilfully and unlawfully possess with intent to distribute and did aid and abet one another in the possession with intent to distribute in excess of one kilogram of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT NINE

That in or about mid July 1983, in the Western District of North Carolina,

JUSTO ENRIQUE JAY,
FERNANDO LOPEZ and

Mark Douglas Morningstar did knowingly, wilfully and unlawfully distribute, and did aid and abet each other in the distribution of in excess of one kilogram of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT TEN

That in or about early September 1983, in the Western District of North Carolina,

JUSTO ENRIQUE JAY,
FERNANDO LOPEZ and

Mark Douglas Morningstar did knowingly, wilfully and unlawfully possess with intent to distribute and did aid and abet one another in the possession with intent to distribute in excess of one kilogram of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT ELEVEN

That in or about early September 1983, in the Western District of North Carolina,

JUSTO ENRIQUE JAY,
FERNANDO LOPEZ and

Mark Douglas Morningstar did knowingly, wilfully and unlawfully distribute, and did aid and abet each other in the distribution of in excess of one kilogram of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT TWELVE

That in or about mid October 1983, in the Western District of North Carolina,

JUSTO ENRIQUE JAY,
FERNANDO LOPEZ and

Mark Douglas Morningstar did knowingly, wilfully and unlawfully possess with intent to distribute and did aid and abet one another in the possession with intent to distribute in excess of one kilogram of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT THIRTEEN

That in or about mid October 1983, in the Western District of North Carolina,

JUSTO ENRIQUE JAY,
FERNANDO LOPEZ and

Mark Douglas Morningstar did knowingly, wilfully and unlawfully distribute, and did aid and abet each other in the distribution of in excess of one kilogram of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT FOURTEEN

That in or about early December 1983, in the Western District of North Carolina,

JUSTO ENRIQUE JAY,
FERNANDO LOPEZ and

Mark Douglas Morningstar did knowingly, wilfully and unlawfully possess with intent to distribute and did aid and abet one another in the possession with intent to distribute in excess of one kilogram of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT FIFTEEN

That in or about early December 1983, in the Western District of North Carolina,

JUSTO ENRIQUE JAY,
FERNANDO LOPEZ and

Mark Douglas Morningstar did knowingly, wilfully and unlawfully distribute, and did aid and abet each other in the distribution of in excess of one kilogram of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT SIXTEEN

That in or about early 1985, in the Western District of North Carolina,

ALBERTO DIAZ, also known as MARK DIAZ,
also known as MARK MARUSO, also known as MOOSE

Mark Morningstar and Romaine Rudolph Leake did knowingly, wilfully and unlawfully possess with intent to distribute, and did aid and abet one another in the possession with intent to distribute 500 pounds of marijuana, a Schedule I non-narcotic controlled substance, in violation of Title 21, Section 841(a)(1), and Title 18, United States Code, Section 2.

## COUNT SEVENTEEN

That in or about early 1985, in the Western District of North Carolina,

ALBERTO DIAZ, also known as MARK DIAZ, also known as MARK MARUSO, also known as MOOSE,

Mark Morningstar and Romaine Rudolph Leake did knowingly, wilfully and unlawfully distribute, and did aid and abet each other in the distribution of 500 pounds of marijuana, a Schedule I non-narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

/s/
Foreman

/s/
Thomas J. Ashcraft
United States Attorney

/s/
Kenneth D. Bell
Assistant United States Attorney

A Fernando.

Q Anybody else ever?

A No, sir, not in that house, never have.

Q And would you make payments in that room as well?

A Yes, sir.

Q Who would you make payments to?

A Fernando.

Q Anybody else?

A No, not at that house; just Fernando.

Q Well, did you ever receive cocaine from Mr. Jay?

A Once about--I guess when I first started. I flew down and went to a Howard Johnson's, and I called to the house; and Fernando wasn't in, and Jay said that he could come by and see me. And he brought by a-half a key at that time.

Q Brought that to your hotel?

A Yes, sir.

Q Did you ever make any payments of money to Mr. Jay?

A Not that I recall, no.

Q How often would you go to the house on 79th Court

that you pointed out, to get cocaine?

A About the same pattern as before. Some time I'd go about once a month. Some time it might be four or five months before I'd go. I'd go a lot of times not to even make transactions. Some time I'd bring down money and.....

but I didn't have any assets.

Q You've been interviewed by Hunter Brown, a Special Agent with the Internal Revenue Service?

A Yes, sir.

MR. BELL: Those are all my questions at this time, Your Honor.

COURT: All right, Mr. Cook.

CROSS EXAMINATION

BY MR. COOK:

Q Mr. Church, I believe you said that you actually got in the cocaine business in a somewhat small way beginning back in the year of 72, three, four, and five?

A I think I said around 73 or 74, yes, sir.

Q 73 or 74. And during that period of time that was when you met Fernando Lopez?

A Yes, sir.

Q That was the beginning of it, wasn't it?

A Yes, sir.

Q Now the relevant periods of the indictment that is being tried in this case is from the fall of 1978 until the fall of 1984. You understand that, don't you?

A Yes, sir.

Q So the questions that I'm going to ask you are going to relate to that time period, from the fall of 1978 until the fall of 1984. During that period of time you did not buy any cocaine from Justo Jay, did you?

A No, sir.

Q You bought your cocaine from Fernando Lopez. That is correct, isn't it?

A Yes, sir.

Q And during that period of time you did not pay Jay any money. Isn't that what you testified to?

A Yes, sir.

Q During that period of time Jay was not involved in any way as far as you know with the cocaine that you got or with the deals that you made. That's correct, isn't it?

A Yes, sir.

Q The indictments in this case, one of the indictments allege, and this is Indictment Number 88-21, Count Number Two, that in or about March of 1983 in the Western District of North Carolina, Justo Jay, Fernando Lopez, and Ronald Eugene Church did knowingly, wilfully, and unlawfully possess with intent to distribute in excess of one kilogram of cocaine in the Western District of North Carolina. That didn't happen as far as Jay was concerned, did it?

A No, sir.

Q Did it?

A No, sir.

Q That was Lopez that you bought it from and Lopez that you paid, wasn't it?

A Yes, sir.

Q The same indictment in Count Number Three alleges that–the same time frame–that Jay, Lopez, and you did knowingly, willfully, and unlawfully distribute in the Western District of North Carolina in excess of one kilogram of cocaine. Jay didn't do that, did he?

A No, sir.

Q You and Lopez did that, didn't you?

A Yes, sir.

Q So during the relevant period of this indictment, from the fall of 1978 until the fall of 1984, not only with Counts Number Two and Three in 88-21, but in this whole situation, you had no cocaine dealings with Justo Jay, did you?

A No, sir.

Q Is it not true that in this house at 79th Court in Miami that a lot of people would congregate there and party there?

A Yes, sir.

Q And that was a commonplace thing, wasn't it?

A Yes, sir.

Q That there would be partying there that had nothing to do with the sale of cocaine or any illegal substance?

A Yes, sir.

Q That was very common, wasn't it?

A Yes, sir.

Q That house, did it have a basement?

A No, sir, not to my knowledge.

Q You've never seen a house in Miami that had a basement, have you?

A No, sir.

Q It was all on one floor, wasn't it?

A Yes, sir.

Q It was sort of, I believe you said, you described it as being sort of like a club house where people would go and party?

A Yes, sir. There was a number of friends come over there quite frequently and spend nights.

Q And Jay had nothing to do with these transactions that you have testified about, during the period of the indictment, from the fall of 78 until the fall of 1984?

A No, sir.

MR. COOK: That's all.

## REDIRECT EXAMINATION

BY MR. BELL:

Q Mr. Church, do you know who Fernando Lopez's source of cocaine was?

A I presumed, but I never did know.

MR. COOK: I object to what he presumed.

A Yes, sir.

Q Did Fernando ever count money in your presence?

A Yes, sir.

Q Did Jay ever count money in your presence?

A Yes, sir.

Q How much money were you giving them at a time?

A The amount due.

Q Well, how much was that usually?

A The price varies from month to month, but right around sixty; and then the price started to decrease because of the market being overflooded.

Q You mean there was more cocaine than people wanted to buy?

A Yes, sir.

Q How long did you continue getting cocaine at this house from Mr. Jay and Mr. Lopez?

A I continued buying cocaine with them up until about 83.

Q There came a time when you got in trouble with them, didn't you?

A Yes, sir.

Q Tell us about that incident.

A I flushed two kilos down the toilet.

Q Tell us how you came to flush two kilograms of cocaine down the toiled.

A Well, I basically thought I was going to be busted.

Q Tell us the whole story. Where were you?

A I was in Boone, North Carolina.

Q Were you in a house?

A Yes, sir.

Q Was it your house?

A No, sir.

Q Whose house was it?

A I was renting it from a Florida man.

Q Were you there alone?

A Yes, sir.

Q And what happened?

A A friend of mine came up. It had just finished snowing a food, and a car drove up to the front with the lights on; and I thought it was the police and flushed the two keys down the toiled.

Q How much did you owe for the two keys?

A A hundred and twenty thousand.

Q To whom did you owe that money?

A To Fernando and Jay.

Q Did that cause some sort of falling out?

A Yes, sir.

Q In fact, were you cut off for a time?

A Yes, sir.

Q What did you do about your cocaine business then when they cut you off?

A I financed a boat and started back with a limited cash of ten thousand dollars.

Q Did you acquire another source of cocaine?

A Yes, sir.

Q And how long did you deal from this other source of cocaine?

A For about six to eight months.

Q Did you get back together with Mr. Lopez?

A Yes, I got back together with Mr. Lopez.

Q How did that come about?

A Basically he found out that I had money and was capable of putting up a down payment for the cocaine

and that I would try to reduce the deficit that I had created.

Q You mean that you'd try to pay off some of what you owed them from flushing the two keys?

A Yes, sir.

Q So did you get back into business with him?

A Yes, sir.

Q When did that business resume with Mr. Lopez?

A Right about the end of 83.

Q About when?

A By the end of 83, summertime, right in there.

Q Can you give us a month?

A April, May, some–right in there.

Q Well, we need you to be as specific as you can. Was it April or May?

A I'll say it was probably around April.

Q Was it by April? We need a yes or no.

A Yes, sir.

Q Are you sure of that?

A Yes, sir.

Q When you got back into the business, how often were you acquiring cocaine then?

A It would be about every month. We tried to limit the number of drives to Miami. We tried to make it on a monthly basis.

Q How much cocaine would you get on a monthly basis?

A Between one and two keys.

Q What would you do with those kilos when you got back?

A I would sell them.

Q Where?

A In the Charlotte area.

Q All of it?

A Yes, and part of it would go to the Chapel Hill area with Michael Best.

A Now after you resumed business with Mr. Lopez in 83, how long did you stay in business with him, that is, how long did you continue to acquire cocaine from him?

A I acquired from Fernando for about the next year.

Q Did you acquire cocaine from him through the end of 83?

guest bathroom between the two bedrooms, and I guess I caught Jay by surprise. He came around with a gun and had a gun on me, and then that was it; and I just went and used the bathroom.

Q He recognized you and that defused the situation?

A Yeah.

Q What room did he come out of with the gun?

A It would be the first bedroom as you come into the house, the one on the picture.

Q Is that where the cocaine transactions and the money counting went on?

A Usually.

Q Was there a lock on that door?

A Yes, sir.

Q Was that door usually kept locked or not?

A I would believe so, I'm not sure.

Q When was that incident when Mr. Jay held the gun on you?

A That was prior to–I believe it was 82, 1982.

Q Now after 1983 and getting into 1984, did you and Fernando Lopez start putting some deals together of your own?

A Yes, sir.

Q What kind of deals did you and Mr. Lopez try to put together?

A We would purchase keys from the Bahamas.

Q What did you do to try to bring that about?

A We basically flew over to Bimini (phonetic) and met some people. And we would drive the boat from Miami over to Bimini and drive it back.

Q Did you have any successful trips that way?

A Yes, sir.

Q How many?

A Two.

Q How much cocaine did you get on those two trips?

A Approximately about eighteen to twenty keys, a small number.

Q And did you have an unsuccessful trip as well?

A Yes, sir.

Q Did you lose money on that?

A Yes, sir.

Q How much?

A About eighty thousand.

Q Now did those trips to the Bahamas have anything to do with Mr. Jay?

A No, sir.

Q Was there any discussion between you and Mr. Lopez about those trips to Mr. Jay?

A No, sir.

Q Did Mr. Lopez say anything to you about whether or not you should tell Mr. Jay about those trips?

A Paranoia, yes, sir, it did.

Q What about hearing voices?

A That just comes along with everybody that uses cocaine.

Q You heard voices that were not there?

A What voices are you speaking of?

Q Any voices.

A I still don't understand your question.

Q All right, I'll move on to another one if you don't understand it. I believe you said any dealings you had with Mr. Jay were up to the first part of 1983?

A That's correct.

Q And you terminated your dealings with him around January or February of 83?

A That's correct.

Q And then the dealings that you had after that were exclusively with Mr. Lopez. Isn't that correct?

A Yes, sir.

Q I am referring to Indictment Number 88-21, Counts Four through Thirteen, all of which allege acts that occurred in North Carolina from mid-April of 1983 through mid-October of 1983. And then if you quit doing business with Mr. Jay around January or February

of 1983, these counts only related to you and Mr. Lopez; didn't they?

A I would assume, yeah.

Q Well, that's the truth, isn't it, as far as you know?

A Yes, sir.

Q The cocaine that was brought to North Carolina or that you brought to North Carolina from mid-April of 1983 until October of 1983, that was all a deal that was made between you and Fernando Lopez?

A April.

Q Yes.

A Yes, sir.

Q And you paid Fernando Lopez for it?

A Yes, sir.

Q And you got it from Fernando Lopez?

A Most of the time, yes, sir.

Q You have said that, I believe, you saw Mr. Jay at a birthday party. Was it in 79 or 80?

A I believe it was 1980.

Q And that was here in North Carolina?

A Yes, sir.

Q And you said at that time that you had a conversation with Fernando Lopez about cocaine, about purchasing cocaine from him–

A Yes, sir.

Q ...from Fernando Lopez; you did not have that conversation with Mr. Jay, did you?

A No, sir.

Q That was with Fernando Lopez only and you had known him.....

told Martinez about his trial testimony. Petitioner has not attempted to explain why Diaz himself has not provided an affidavit regarding his own recantation. In any event, Martinez's affidavit is wholly insufficient to cause the Court to reopen the case.

> The applicable standards for the granting of a new trial based upon a witness's recantation were set out in *Larrison v. United States*, 24 F.2d 82, 87--88 (7 Cir. 1928). There, the court stated that a new trial should be granted when:
> (a) The court is reasonably well satisfied that the testimony given by a material witness is false.
> (b ) That without it the jury *might* have reached a different conclusion (emphasis in original).
> (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

*United States v. Wallace*, 528 F.2d 863, 866 (4th Cir. 1976). Petitioner fails on the first and third elements.

There is nothing to call into question the truthfulness of Diaz's trial testimony. Martinez's affidavit is essentially meaningless, as are petitioner's arguments that Diaz, if indeed he wishes to change his testimony, is more likely to now be telling the truth than nine years ago. For instance, petitioner argues that Diaz's recantation is a statement against interest, in that it subjects him to the penalties of perjury. Petitioner has spent scores of pages discussing the five year statute of limitations, yet suggests that Diaz's testimony of nine years ago, now alleged to have been false, is open to a perjury prosecution. Unless petitioner means that Diaz's hoped for testimony recanting his trial testimony will be subject to a perjury prosecution, his argument is nonsensical. And if perjurious, it certainly should not result in a new trial.

He further argues that Diaz's pretrial interview by the prosecutor and case agent produced notes that should have been turned over to the defense. He does not even attempt to state a ground.....

Jay said, you know, I don't want to see him any more. If you want to see him or if Fernando wants to see him, let Fernando see him.

Q And that was late 84?

A Yeah.

Q Did you and Fernando Lopez continue to get cocaine to Claudio Villoch?

A Yes, we did.

Q That was without Mr. Jay?

A Without Jay's consent, yes.

Q Where did you and Mr. Lopez get the cocaine?

A Sometimes I would get it, sometimes Fernando would get it.

Q From where?

A Fernando had–I guess Fernando back then in late 84 or 85, he had other sources besides from Jay; and he would get it sometimes from Jay, he tells me, and sometimes he would get it from other sources.

Q Well, between the time that you first started stashing cocaine in the late 70's, up until the end of 1984, did Mr. Lopez have any other source for cocaine besides Mr. Jay?

A Not right up to the time.

Q Not up till the end of 84?

A No, that's it. Later on they started falling apart.

Q Mr. Diaz, you've entered or agreed to enter a guilty plea.....

statements related to the grand jury by Agent Holland in a hearsay manner as to what Mr. Church or Mr. Morningstar told him about those transactions, those would be exculpatory in light of Mr. Diaz' testimony. Furthermore, Mr. Diaz stated that the four transactions contained in Indictment 88-68 did not involve Mr. Jay in any manner, and we would move for those grand jury transcripts to be turned over pursuant to Brady v. Maryland because there are other witnesses who have said that Mr. Jay is implicated. And in light of Mr. Diaz' testimony, that would be Brady material and matters that we could probe them on cross examination with.

COURT: All right, as to the limiting instruction as to Counts Two through Fifteen–

MR. BELL: Obviously Mr. Diaz' testimony goes most appropriately to the CC and the conspiracy count, but I would ask the Court not to limit all of its use for the substantive offenses because Mr. Diaz' testimony in part was that of the cocaine that Mr. Lopez got and came to all these different people was from Mr. Jay. And the substantive offenses have to do with Mr. Church and Mr. Morningstar getting cocaine in 1983. And Mr. Diaz said that Mr. Jay was the source of that cocaine all the way through 83, even all the way through 84. And of course our theory or our charge is an aiding and abetting. So Mr. Diaz' testimony needs to be allowed to the effect that Mr. Jay aided and abetted those distributions and...

perspective. The one time seller, Joe Blow goes up to a guy on the street and says sell me five grams of coke. That doesn't put him in a conspiracy. That doesn't make him a CCE person for that conduct. The case here shows something a lot more than a buyer/seller relationship. This is a continuous ongoing organizational relationship. But I didn't want you to be distracted by it. But that's just simply not the case here, and I think you understood that. There's something else I wanted to go into. When I started my original closing argument, I told you that we had certain tools or weapons that we could use and I named them, the aiding and abetting charge, the conspiracy charge, and the CCE. The arguments of Mr. Wyatt and Mr. Cook completely ignored the aiding and abetting statute. They want you to go off on the tangent that Mr. Jay did not come into this district and that he didn't personally hand the cocaine to Mr. Church and Mr. Morningstar in 1983 and that's just not required. Listen to His Honor's instructions on aiding and abetting. You see, the evidence is that Mr. Jay had always been the source of supply for Mr. Lopez. All the witnesses knew that he was the source of supply. Most of them had hand-to-hand payments or receipt of cocaine from him. Mr. Diaz testified that relationship continued all the way through 83, with Mr. Jay being the exclusive source of supply for Mr. Lopez. And then you've got Mr. Jay having a false.....

# AFFIDAVIT

BEFORE ME, personally appeared the undersigned, JOHN KENNETH ZWERLING, Attorney-at-Law, who hereby swears and deposes as follows:

1. My name is John Kenneth Zwerling. I am duly licensed to practice law in all state and federal courts in Virginia, the United States Court of Appeals for the Fourth Circuit as weil as the United States Supreme Court. I currently represent Mr. JUSTO JAY in connection with his Motion to Vacate his Conviction. I have represented Mr. JAY in this matter since early 1994.

2. On or about June 28, 1994, I received an unsolicited and unexpected telephone call from a gentleman who identified himself as Mr. EMILIO DELACAL. He advised me that he was Mr. ARSENIO DIAZ'S attorney. He further advised me that Mr. DIAZ had informed him that Mr. JUSTO JAY stopped supplying Mr. MORNINGSTAR and Mr. CHURCH, either through Mr. FERNANDO LOPEZ or any other way, since at least the end of 1982.

3. Mr. DELACAL stated that Mr. DIAZ was no longer in prison and was willing to sign an affidavit to clarify his trial testimony which incorrectly accused Mr. JAY of being Mr. LOPEZ'S sole source of cocaine in 1983 and 1984. He said that he would try to set up a meeting between Mr. DIAZ and myself.

4. Mr. DELACAL gave me his, Mr. DELACAL'S, address and telephone number as:

780 NW Le Jeune Road
Suite 525
Miami Florida 33126

(305) 444-8244

5. Mr. DIAZ called me on June 29, 1994, at about three o'clock p.m. He told me that I could reach him at (305) 554-6667 between ten o'clock a.m. and four o'clock p.m. He worked as a clerk in a dental office located at:

Gables Dental
8370 West Flagler Street
Suite 222
Miami Fl 33144

6. Mr. DIAZ said that he would be on parole for three (3) more years. He then told me that he had a meeting with Mr. JAY and Mr. LOPEZ in 1982, at which time he heard Mr. JAY tell Mr. LOPEZ that he, Mr. JAY, would no longer deal with the North Carolina people and that he did not want Mr. LOPEZ to deal with them either.

7. Mr. DIAZ said that shortly before Mr. JAY'S arrest in 1988, he, Mr. DIAZ, helped Mr. LOPEZ leave the country. Mr. JAY refused his help and stated that he would not run away because he was innocent.

8. Mr. DIAZ said that from 1982 on, as far as he knows, Mr. JAY did not deal with Mr. CHURCH or Mr. MORNINGSTAR directly or through Mr. LOPEZ.

9. Mr. DIAZ stated that, at the time of his trial testimony, he was under stress and did not mean to testify that Mr. JAY was Mr. LOPEZ'S sole source of cocaine until the end of 1984. He said that he, Mr. DIAZ, supplied Mr. LOPEZ with cocaine in 1982, 1983 and 1984.

10. Mr. DIAZ told me that, prior to his plea agreement, he had asked Mr. JAY to sign an affidavit for him but Mr. JAY said he could not do it. That is when he told Mr.

JAY "I must do what I must do." Mr. JAY told him "to do what you must."

11. Mr. DIAZ said that Mr. LOPEZ often lied to the North Carolina people about who his sources of supply were. Mr. LOPEZ would say Mr. JAY and Mr. DIAZ were the source in order to help collect his money since Mr. CHURCH and Mr. MORNINGSTAR respected Mr. DIAZ and Mr. JAY, but not Mr. LOPEZ. He said the five hundred (500) pounds of marijuana in one of the indictments was a good example.

12. Mr. DIAZ agreed to meet with me, and on July 18, 1994, we met in the Miami, Florida area at the offices of GUY TURNER, Esquire. The meeting took place at about 11:15 a.m. We spoke for a while about things in general. He expressed his belief that Mr. JAY was in truth not guilty of the North Carolina charges.

13. Mr. DIAZ related the following:

A. He was arrested on or about April 12, 1988.

B. He did not recall discussing with the Government whether or not Mr. JAY was still Mr. LOPEZ'S supplier in 1983-1984. He thinks that he was surprised when that question was asked in court. Having now read his testimony, he is surprised by his answer because it was not true and it contradicts the part of his trial testimony where he admits that he supplied Mr. LOPEZ with cocaine in 1984.

C. He met Mr. CHURCH and Mr. MORNINGSTAR through Mr. LOPEZ

in the late 1970's. Even as early as 1979, he told Mr. LOPEZ not to deal with them. He believed they would turn him in if they ever got caught.

D. He was at a meeting in 1982 when Mr. JAY told Mr. LOPEZ that he wanted nothing further to do with the North Carolina people (Mr. CHURCH and Mr. MORNINGSTAR).

E. Even before that conversation, Mr. LOPEZ was cheating on Mr. JAY. He bought and sold cocaine behind Mr. JAY'S back. Mr. DIAZ has direct knowledge of this since he was one of the people who sold [fronted] cocaine to Mr. LOPEZ in 1982, 1983 and 1984.

F. He can not understand why Mr. JAY'S lawyers did not question him about how he could say that Mr. JAY was Mr. LOPEZ'S only source when he had no way of knowing this since he did not follow them around. In any event, it was not true since he had admitted that he was a source of Mr. LOPEZ'S during that time period. If they had challenged that claim, he would have had to back away from his testimony that "I know that Jay was LOPEZ'S only source in 1983-1984."

G. He remembered three specific times that he supplied cocaine to Mr. LOPEZ:

1. Before the 1982 meeting

regarding North Carolina, there were three (3) kilos of cocaine that he, Mr. DIAZ, fronted to Mr. LOPEZ. Mr. LOPEZ paid him in two (2) installments for a total of $80,000-$100,000 [he wasn't confident of the amount]. Mr. JAY knew nothing about this.

2. After that meeting and before the next, he, Mr. DIAZ, drove 2-3 kilos to Mr. LOPEZ. After he delivered the cocaine to Mr. LOPEZ, he stayed and watched television. Mr. MORNINGSTAR arrived. Why he came was not made known to Mr. DIAZ. It is possible that the cocaine was for him.

3. In 1984, he described that deal at trial. "JAY didn't supply this coke I did."

H. Mr. LOPEZ told him about a person who at the time of the interview was in Raybrook Prison who sold cocaine to Mr. LOPEZ in 1983-84. Mr. LOPEZ offered to introduce Mr. DIAZ to him, but Mr. DIAZ refused. Mr. DIAZ later met this person at a function where their daughters went to school. It was in 1983-1984. They made small talk only. He told Mr. LOPEZ about it, and said he did not get a good feeling about this person and did not want Mr. LOPEZ to

make any introductions.

I. Mr. LOPEZ told him that he, Mr. LOPEZ, got some cocaine from Mr. JAY during that period but Mr. LOPEZ can not be trusted when talking about his sources.

J. He knows that Mr. LOPEZ told Mr. CHURCH AND Mr. MORNINGSTAR things about his sources that were untrue. He learned of this after his interview with JAMES WYATT and before the trial.

K. While he was in a jail in [ph] Rutherford Town, they brought Mr. MORNINGSTAR there. When Mr. MORNINGSTAR saw him, he got scared (this was before Mr. DIAZ had agreed to cooperate with the government.) Mr. MORNINGSTAR said "I'm sorry." Mr. DIAZ said, "Why did you lie about me?" Mr. MORNINGSTAR then told him that Mr. LOPEZ had told him that he and Mr. JAY were involved in the 1983-84 cocaine deals and the five hundred (500) pound marijuana deal. Mr. DIAZ explained to Mr. MORNINGSTAR that it wasn't true. They determined that Mr. LOPEZ told these lies because it was useful in getting Mr. MORNINGSTAR and Mr. CHURCH to pay him in a timely fashion. Therefore, Mr. LOPEZ would lie and say Mr. JAY and Mr. DIAZ are upset about not getting paid.

Mr. DIAZ was firm that he told Mr. MORNINGSTAR that it was a complete lie about Mr. JAY supplying cocaine to Mr. LOPEZ in 1983. Mr. DIAZ believes that he told the government that the marijuana charge was not true, and that is why they dropped that charge against Mr. JAY.

L. Until he read the transcript of his testimony, he had no idea that he testified that he knew Mr. JAY was Mr. LOPEZ'S sole source of cocaine during 1983-1984. It is clearly contradicted by other parts of his testimony. Not only was he in no position to know where Mr. LOPEZ got all of his cocaine, but he did know that Mr. LOPEZ got some cocaine from himself and others during that period.

M. After 1984, Mr. LOPEZ did tell Mr. DIAZ that he had gotten cocaine from other sources during 1983-1984.

N. Mr. DIAZ happened to be at Mr. LOPEZ'S house when Mr. MORNINGSTAR came by during the five hundred (500) pound marijuana deal. It was a pure coincidence, but Mr. MORNINGSTAR has told him that Mr. LOPEZ claimed it was Mr. DIAZ'S marijuana. It was not his marijuana.

O. Finally, Mr. DIAZ stated that Mr. JAY

is not guilty of these charges.

14. During this meeting with Mr. DIAZ, I took notes on my computer in the form of a memorandum to the JAY file, and on July 27, 1994, I sent a copy of that memorandum to Mr. DIAZ. (See Exhibit JZ 1A, Memorandum to Jay file dated July 18, 1994.)

15. In the cover letter that I sent with the memorandum, I requested that Mr. DIAZ review it and advise me of any material errors or omissions that it may contain. (See Exhibit JZ 1B, cover letter to Arsenio Diaz dated July 27, 1994.)

16. In early August of 1994, Mr. DIAZ called me and stated that he had reviewed the memorandum and noted some corrections which he said he would hand write and send to me.

17. In early August of 1994, I received a letter from an attorney in Miami by the name of RICHARD MARTINEZ. He was one of the attorneys for SALVATOR MAGLUDA. Mr. MAGLUDA is one of the individuals whose name came up in Mr. JAY'S trial as a partner of WILLIE FALCONE. Mr. MARTINEZ informed me that he and another attorney, JEFFERY WEINER, had interviewed Mr. DIAZ shortly after I did, and Mr. DIAZ told them that:

A. Mr. DIAZ had no illegal drug dealings with Mr. JAY after 1982.

B. Mr. LOPEZ had numerous sources of cocaine during the period between 1982 and 1984.

C. Mr. DIAZ advised the prosecutor of the above prior to his testifying against Mr. JAY.

18. On August 4, 1994, Mr. DIAZ prepared a handwritten memorandum entitled "Notes & Corrections on Memo from Date July 18th/94" (See Exhibit JZ 2A, a photocopy of handwritten notes dated August 4, 1994, the original of which is still in my possession and will be filed with the clerk. See Exhibit JZ 2B, the typed version of JZ Exhibit 2A that was prepared by my office.)

19. Based upon Mr. DIAZ'S memorandum, I prepared a "Draft Affidavit" and sent it to Mr. DIAZ. (See Exhibit JZ 3, 2nd draft - Statement of Arsenio Diaz.)

20. On January 20, 1995, my secretary, MS. SWILLEY, mailed to Mr. DIAZ another draft affidavit, requesting that he check it for accuracy. (See Exhibit JZ 4, cover letter to Arsenio Diaz dated January 20, 1995.)

21. On January 26, 1995, an attorney who was assisting me in this case, LAURA WALKER, and I called Mr. DIAZ and discussed the draft affidavit. Mr. DIAZ said there were some points that he wanted to make. These points were as follows:

A. He will read the draft affidavit (he has received it) and will call me and advise me if any further changes are necessary.

B. He thinks that he needs to talk to his own attorney before signing anything.

C. He wants to check with his parole

officer to make sure he will not violate parole by signing it.

D. He wants to talk to an attorney in Miami about some type of harassment that Mr. DIAZ is facing in Miami.

E. He wants to wait until the trial of Mr. FALCONE and Mr. MAGLUDA is over.

F. He said that he was afraid that the government would incarcerate him for telling the truth. He mentioned INS since he is not a citizen, only a resident alien.

G. He stated that Mr. JAY'S trial was a fraud but he is still mad at Mr. JAY for not signing an affidavit for him before his trial in North Carolina.

22. I prepared a memorandum of that conversation that day. (See Exhibit JZ 5, Memorandum to Jay file dated January 26, 1995.)

23. Around the middle of February, 1995, Mr. DIAZ agreed to meet with RICHARD MARTINEZ, Esquire, and sign the affidavit. (See Exhibit JZ 6, Affidavit of Richard Martinez) which discusses his two meetings with Mr. DIAZ. Mr. DIAZ took the proposed affidavit. (See Exhibit JZ 7A, cover sheet from The Law Offices of Richard Martinez, Dated February 15, 1995. See Exhibit JZ 7B, proposed Affidavit of Arsenio Diaz that was attached to Exhibit JZ 7A.) Mr. Diaz did not re-contact anyone for nearly a year.

24. On February 29, 1996, which was shortly after the verdict in the FALCONE/MAGLUDA trial, Mr. DIAZ telephoned me and apologized for not getting back to me for such a long time, but reaffirmed his willingness to sign the affidavit. I prepared a memorandum of that conversation that day. (See Exhibit JZ 8, Memorandum to Jay file dated February 29, 1996.)

25. I made arrangements for him to do so at the Law Offices of GUY TURNER, Esquire. On March 4, 1996, Mr. DIAZ went to Mr. Turner's office where he reviewed the proposed affidavit, expressed his satisfaction with it, took a copy of it with him and promised to schedule a time to come back and execute it. (See Exhibit JZ 9, Affidavit of Guy Turner, with a copy of the proposed affidavit which he gave to Mr. Diaz on that day, as well as a copy of the cover sheet that Mr. Turner sent to us, dated March 4, 1996.)

26. Since that time, I have been unsuccessful in getting Mr. DIAZ to sign the affidavit. He has consistently said to me that even though the facts in the proposed affidavit are true, he is afraid that the government would find a way to punish him for voluntarily helping Mr. JAY. He has also said that if there is a hearing and he were required to testify as a subpoenaed witness, he would testify truthfully.

FURTHER AFFIANT SAYETH NAUGHT

/s/
JOHN KENNETH ZWERLING,
AFFIANT

COMMONWEALTH OF VIRGINIA,
CITY OF ALEXANDRIA; to-wit

The foregoing instrument was acknowledged before me this 14th day of January, 1998, by JOHN KENNETH ZWERLING, who is personally known to me or who has produced identification and who took an oath.

/s/
Notary Public
I was commissioned as
Cheryl M. Klute.

My Commission Expires: 9/30/2001

# AFFIDAVIT

BEFORE ME, personally appeared the undersigned authority, RICHARD I MARTINEZ, who hereby swears and deposes as follows:

I have met with Arsenio Diaz on at least two occasions since his release. On each such occasion we have discussed his involvement in the Justo Jay case. Arsenio Diaz has advised me of the following:

1. Arsenio Diaz was arrested on or about April 12, 1988.

2. Arsenio Diaz entered into a plea agreement with the government in his case in the Western District of North Carolina.

3. When Arsenio Diaz was debriefed, he informed the government that he, Arsenio Diaz, supplied Fernando Lopez with cocaine on two occasions from 1982 through 1984. However, due to the mental stress and instability of which Arsenio Diaz suffered at the time, he did not inform the government of some critical events which transpired during those years.

4. Arsenio Diaz has read the testimony he gave during the case against Justo Jay. In that testimony Arsenio Diaz stated that Justo Jay was the sole source of cocaine to Fernando Lopez. Arsenio Diaz stated that that statement is incorrect and inconsistent with the statement Arsenio Diaz gave the government where he disclosed that he too supplied Fernando Lopez with cocaine through 1984.

5. Arsenio Diaz recalled that sometime during 1982, Justo Jay, who had been supplying Fernando Lopez with cocaine, told Fernando Lopez and Arsenio Diaz that he, Justo

Jay, no longer wished to supply Fernando Lopez with cocaine and that Fernando Lopez should not deal with Church or Morningstar anymore.

6. Subsequently, on two occasions, Arsenio Diaz supplied Fernando Lopez with cocaine with which Jay had no connection. Arsenio Diaz informed the government of this fact.

7. During Justo Jay's trial, Arsenio Diaz admitted that he supplied Fernando Lopez with cocaine in 1984. If properly cross-examined, Arsenio Diaz would have also admitted that he supplied Fernando Lopez with cocaine on other prior occasions as well. If Justo Jay's attorney would have challenged Arsenio Diaz on these answers and examined in detail, he, Arsenio Diaz, would have undoubtedly correct his testimony.

8. Arsenio Diaz stated it was not his intention to lie during his testimony. However, because of the mental stress he was under and the confusing questions from both the government and the defense, he did not testify clearly and his statements were misleading.

9. Arsenio Diaz reiterates that to his knowledge Justo Jay had clearly withdrawn from any dealings with Church and Morningstar prior to any 1983 transactions, including any transactions which were the subject of the indictment against Justo Jay in North Carolina.

10. Arsenio Diaz recalled that Fernando Lopez told him, in 1984, that he had purchased cocaine from another individual during 1983 and 1984. Arsenio Diaz does not recall the individual's name, however, he did meet the individual by coincidence at one of his daughter's school functions. Later, Fernando Lopez offered to introduce Arsenio Diaz to the individual but Arsenio Diaz refused because he felt uncomfortable with him.

11. Arsenio Diaz believes that on occasion Fernando Lopez misinformed Morningstar and Church about Lopez' source of drugs in order to be paid timely. Fernando Lopez' felt that Morningstar and Church respected Justo Jay and Arsenio Diaz. Therefore, Morningstar and Church would pay in a timely fashion if he Fernando Lopez would advise them that Justo Jay or Arsenio Diaz were upset about late payments.

12. Arsenio Diaz also recalled a specific instance when Fernando Lopez told such a lie. Sometime in 1984, while Arsenio Diaz visited Fernando Lopez at his home, Fernando Lopez stated that he, Lopez, had fine hundred pounds of marijuana and asked if Arsenio Diaz would like to purchase any. Arsenio Diaz advised Fernando Lopez that he was not interested. Later that same day, Morningstar visited Fernando Lopez and saw Arsenio Diaz there by coincidence. Later Morningstar told Arsenio Diaz that Fernando Lopez had told him that Arsenio Diaz was present because Arsenio Diaz was the supplier of the marijuana. Arsenio Diaz was not the supplier of the marijuana.

FURTHER AFFIANT SAYETH NAUGHT

/s/
RICHARD I. MARTINEZ, AFFIANT

STATE OF FLORIDA
)SS:
COUNTY OF DADE

The foregoing instrument was acknowledged before me this 16 day of April, 1997 by Richard I. Martinez who is personally known to me or who has produced identification and who took an oath.

Notary Public
State of Florida at Large

PRINTED NAME /s/
Commission No.: _____
(X) Personally known to me; or
( ) Produced Identification

(Humberto R. Dominquez; My Commission CC606008, Expires December 8, 2000)

# AFFIDAVIT OF GUY W. TURNER, ESQ.

I, GUY W. TURNER, ESQ., being duly sworn and deposed, hereby states as follows:

1. That I am an attorney licensed to practice law both in the Federal Court and the State of Florida.

2. That on or about July 18, 1994, Attorney John Zwerling, met with an individual known to me as Arsenio Diaz, in my office.

3. The subject of that meeting was Mr. Diaz's concern that testimony he had provided at the trial of Justo Jay in the Western District of North Carolina was incorrect in several aspects.

4. Following his meeting with Mr. Zwerling, Mr. Diaz met with me on a couple of occasions to review a statement as to his testimony at Justo Jay's trial.

5. On March 4, 1996, Mr. Arsenio Diaz met at my office and reviewed a revised draft of a statement regarding Mr. Diaz's testimony on the Jay's matter. At that time he advised me that it has been revised pursuant to his request and correctly stated what had happened at the Jay's Trial.

6. That on March 4, 1996, Mr. Diaz took a copy of his statement with him, advising me that he would sign it, have it notarized, and return it to me within the week.

7. On that same day, I faxed the attached memo and a copy of Mr. Diaz's statement to John Zwerling, Esq. (Attachment #1, 4 pages).

8. As of this date, Mr. Arsenio Diaz has yet to return the statement.

I have read the aforementioned statement, I fully understand this statement and swear it is true, accurate and complete to the best of my belief.

/s/
GUY W. TURNER

Sworn to and subscribed before me this 8 day of January, 1998, personally appeared before me, GUY W. TURNER, whom I know personally.

/s/
NOTARY PUBLIC

My Commission Expires:

(LOURDES ABRAHAM; MY COMMISSION # CC650146; EXPIRES: June 19, 2001)

*GUY W. TURNER, P.A.*

GUY W. TURNER, ESQ.

**TRANSMITTAL SHEET**

TO: John Zwerling, Esq.

FAX NO.: (703) 548-0572

FROM: Guy W. Turner, P.A.

FAX NO.: (305) 443-2556

DATE: March 4, 1996

RE: **Justo Jay - Witness Arsenio Diaz**

NUMBER OF PAGES (including cover sheet): Four (4)

COMMENTS:

Dear John:

Attached please the revised statement of Arsenio Diaz. Mr. Diaz came by my office today. He reviewed the statement and was satisfied with it. He advised me that he was taking the statement with him. He also mentioned that he had a meeting scheduled for this week and would get back with me towards the end of this week.

Sincerely,
/s/
Guy W. Turner

**THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT**

**IS ADDRESSED. IT CONTAINS INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW.** IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE (COLLECT) AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE UNITED STATES POSTAL SERVICE. THANK YOU.

GUY W. TURNER, P.A., 2916 DOUGLAS ROAD,
SUITE 3, CORAL GABLES, FLORIDA 33134

STATEMENT OF ARSENIO DIAZ

I, ARSENIO DIAZ, first being duly sworn and deposed do hereby swear as follows:

1. I was arrested on about April 12, 1988.

2. I entered into a cooperation agreement with the Government in my case in the Western District of North Carolina. I do not recall discussing with the Government whether or not Jay was Lopez's supplier in 1983-1984, but I did express to them my belief that Jay was in truth not guilty of the North Carolina Charges. There was a meeting at the Rutherford jail with AUSA Bell and agent Holland. They both took notes as I spoke. I believe that I was surprised when the question about Lopez's supplier was asked in court. Having now read my testimony, I am surprised by my answer (that Jay was Lopez's sole source of cocaine in 1983-84) because it is not correct. It even contradicts the part of my trial testimony where I admitted that I supplied Lopez with cocaine in 1984.

3. I was at a meeting in 1982 when Jay told Lopez that he wanted nothing further to do with the North Carolina people (Church and Morningstar). Jay said something to the effect that, "I don't want anything more to do with them AND I DON'T WANT YOU TO DEAL WITH THEM EITHER."

4. Even before that conversation, Lopez was doing drug deals that Jay knew nothing about. I have direct knowledge of this since I was one of the people who sold (fronted) cocaine to Lopez in 1982, 1983, and 1984.

5. I can't understand why Jay's lawyers didn't question me about how in the world I could say that Jay was Lopez's only source when I had no way of knowing this since I didn't follow Lopez around. In any event it was an error since I had admitted that I was a source of Lopez's during that time

period. If they had challenged that claim I would have had to back away from that mistake in my testimony. Clearly it was not correct that "I know that Jay was Lopez's only source in 1983-1984."

6. Because of the extreme stress, I incorrectly answered as explained above.

7. I described the 1984 deal at Jay's trial. Jay didn't supply this coke, I did. To the best of my knowledge Jay had withdrawn from any dealings with Morningstar and Church prior to the 1983 events that he was charged with in North Carolina.

8. I was told by Lopez that some guy who is now serving time in Raybrook sold him coke in 1983 and 1984. Lopez offered to introduce us but I refused. I later met the guy at a function where our daughters went to school. It was in 1983-1984. We made small talk only. I told Lopez about it and said that I didn't get a good feeling about the guy and didn't want Lopez to make any introductions. I have no actual knowledge of Lopez's transactions with this guy.

9. I know that Lopez did cocaine deals in 1982, 1983 and 1984 separate and apart from Jay and that Jay did not know about them.

10. I know that Fernando told the N.C. guys things about his drug sources that were untrue. I learned of this after my interview with Mr. Wyatt and before the trial.

11. I was in a jail in Rutherford. They brought Mark Morningstar there. When Mark saw me, Mark got scared. [This was before I agreed to plead]. Mark said "I'm sorry." I said, "Why did you lie about me?" Mark then told me that Lopez had told him that Jay and I were involved in the 1983-84 coke deals and the 500 pound MARIJUANA deal. I explained to

Mark that that wasn't true. We determined that Lopez told these lies because it was useful in getting Mark and Church to pay him in a timely fashion. Therefore, Lopez would lie and say Jay or I were upset about not getting paid. I am sure that I told Mark that that was a complete lie. I also told the government that the Marijuana charge was not true.

I happened to be at Lopez's house when Mark came by on the 500 pound marijuana deal. It was a pure coincidence but Mark told me that Lopez claimed it was my grass. Lopez lied to Mark about this.

12. Until I read the transcript of my testimony I did not realize that I had testified that I knew Jay was Lopez's sole source of cocaine in 1983-1984. It is clearly incorrect. Not only was I in no position to know where Lopez got all of his coke, but I did know that Lopez got some coke from myself during that period.

13. Some time after 1984 Lopez told me that he had gotten coke from sources other than Jay or me during 1983.

14. It is my sincere belief that Justo Jay is not guilty of those charges that he was convicted of in North Carolina.

15. I was never told that Mr. Wyatt wanted to reinterview me after I signed my plea agreement.

16. I was not lying then, nor I am lying now.

I have read the foregoing statement consisting of _____ pages, I fully understand this statement and swear it is true, accurate and complete to the best of my knowledge and belief.

_____

ARSENIO DIAZ

Sworn to and subscribed before me this ___ day of _____, 1996, personally appeared before me, Arsenio Diaz, and produced identification _____.

_____
NOTARY PUBLIC

My commission expires: _____

# AFFIDAVIT OF JAMES F. WYATT, III

I, James F. Wyatt, III, after being duly sworn, state the following under oath.

1. My name is James F. Wyatt, III. I am duly licensed to practice law in all state and federal courts in North Carolina.

2. I graduated from Duke Law School in 1982, and then clerked for a federal judge in the United States District Court for the Northern District of Georgia. Afterwards, I worked with the law firm of Cook & Palmour for approximately two years, before opening my own law office in Charlotte, North Carolina, in 1986. I have continued to practice law in Charlotte since this date. My Martindale Hubble listing is attached as Exhibit 1.

3. My practice consists of litigation matters, with an emphasis on federal criminal work.

4. Mr. Bobby Lee Cook and I were hired to represent Justo Jay in connection with the case of United States v. Jay, which was brought in the Western District of North Carolina, Charlotte Division. Mr. Cook and I were co-counsel in this matter.

5. My representation of Jay occurred nearly ten years ago. Before drafting this affidavit, I recently received the trial materials in Jay's case. These materials consisted of over 14 bankers boxes of material.

6. I met with Jay on a frequent basis prior to trial. I usually saw him once a week, or at least once every two weeks. Jay and I had extensive discussions about the potential evidence in his case, as well as the statue of limitations defense, the withdrawal defense, and whether he could testify in his case.

I also had frequent discussions with Bobby Lee Cook concerning these matters, and he made several trips to North Carolina to meet personally with Jay.

7. Based upon the date that the relevant indictments were returned, the statute of limitations provided a defense for Jay as of March 9, 1983. In other words, if the Government could not prove overt acts involving drug dealing by Jay in North Carolina beyond this date, their case would fail.

8. Prior to the trial of this matter, the Government offered Jay a plea bargain. The plea bargain was that, if Jay cooperated fully, the Government would agree to a sentence of 20 to 25 years or less. This plea bargain was communicated to Jay, who rejected it.

9. At the time the plea offer was extended, the Government made it clear that it was interested in Jay giving testimony against Willie Falcone and Sal Magluda, two alleged large-scale drug dealers who had not, at that time, been charged in federal court with drug offenses. Testimony against other individuals was also sought by the Government.

10. With regard to the allegations that the defense failed to argue that an aiding and abetting theory alone is insufficient to support a CCE conviction, I have reviewed the relevant case law contained in Jay's files and the jury charges submitted by the defense, as well as the legal arguments made by the defense during the course of Jay's trial. The jury charges correctly reflect the position of the defense with regard to the CCE charge. The defense was aware of all pertinent Fourth Circuit authority relating to CCE charges, as well as authority from other circuits. I do not recall, however, discussing the issue of whether an aiding and abetting theory on a CCE charge is, as a matter of law, a viable legal theory, nor do I recall arguing the legal theory to court.

11. Mr. Cook and I prepared the legal arguments and the jury charges in the Jay case, and were assisted in this undertaking by Martin Weinberg, an attorney from Boston. Mr. Weinberg provided us with draft jury charges, as well as the benefit of research he had done in the CCE area. Mr. Weinberg attended the trial of Jay's case, had input with defense counsel during the case, and handled the appeal of Jay's case.

12. Although I do not recall my specific discussions with Jay concerning his right to testify, it is my usual courts of practice to discuss this matter with all of my clients. I am sure that, at least during the initial stages of his case, we discussed his right to testify.

13. Given the facts of the case, there was no real issue about Jay testifying. Indeed, Mr. Cook and I believed that it would be greatly against his interest for him to testify for several reasons. First, the Government had made a plea offer which sought cooperation. Jay rejected this plea offer, and did not want to prosecute. Had Jay testified, he would have either essentially given the Government free cooperation or he would have been held in contempt if he refused to answer questions concerning individuals such as Willie Falcone and Sal Magluta. Further, if he denied any association with them, it would have severely damaged his credibility as a witness at trial. Second, if Jay testified, he would have had to explain the following post-limitations conduct: the three false driver's licenses that he or someone on his behalf obtained; his conviction for firearms possession; his arrest at the Miami airport in late 1983, where guns, drugs, false identification and case were found on him (though the charges were ultimately dismissed); and his association with alleged co-conspirators past the limitations date. Jay's firearms possession conviction involved conduct that began in approximately 1980 and extended through July of 1983. Thus, the Government could have cross-examined him concerning why he would need an arsenal of weapons (approximately 35 of them) beyond the statute of limitations

date. After the relevant for the expiration of the statute of limitations, Jay was also the best man at Fernando Lopez's wedding, and Mark Morningstar was a member of the wedding party. The wedding party dressed for the wedding at the house that was alleged to be the stash house in this case. Although specific drug transactions were allegedly not discussed during this wedding, this association beyond the limitations period would not have been beneficial to Jay's defense. Further, at some point and time after the limitations period, Jay met with Lopez and Morningstar to discuss the fact that Ronald Church was cooperating. Although no drug transactions were allegedly discussed at this meeting, this association again would not be beneficial for Jay from a trial perspective. Third, if Jay testified, he would have had to admit to drug dealing after the limitations period, even though it did not involve drug dealing in North Carolina. In my opinion, a Charlotte jury would be much less likely to acquit him if he personally testified about extensive drug dealing before the limitations period, and thereafter in areas other than North Carolina, as opposed to there being insufficient evidence presented by the Government as to his drug dealing within the limitations period in North Carolina.

14. I do not recall having any meeting with Jay during trial concerning his right to testify. Even if Jay could refute Arsenio Diaz's testimony, it was our trial judgment that calling him as a witness was filled with danger, as outline above.

15. The foregoing evidence also illustrates why defense counsel viewed a withdrawal defense as untenable in terms of having Jay testify to it.

16. With regard to the interview of Arsenio Diaz, I interviewed him on May 20, 1988 and May 23, 1988. A copy of the portion of my interview memorandum and my rough notes relating to the statements made by Diaz as referenced in the petition is attached as Exhibit 2. During the trial of the case, I do not recall discussing with Jay the possibility of me testifying

as a witness concerning the statements Diaz made to me.

17. With regard to the scope of Diaz's cross-examination, it was defense counsel's trial strategy to limit his testimony as it related to the limitations period, and a strategic matter to leave alone his statement about Jay's post-limitations drug involvement with Fernando Lopez. If we pressed Diaz on this point, we felt it would bring out further adverse testimony. Indeed, Diaz's attorney, Marshall Karro, had informed me prior to trial that delving into Diaz's post-limitations testimony was a "minefield," and would only weaken Jay's case.

18. With regard to the sentencing hearing, trial counsel knew that, in light of the large quantity of narcotics involved in this case, the trial judge would impose the maximum sentence. Jay was informed of this fact from the beginning of his case. Prior to the sentencing hearing, Jay associated Alan Ellis, a sentencing specialist, to assist in sentencing matters, including prison designation. The pre-sentence report was reviewed in detail with Jay and Mr. Ellis.

This the 20 day of August, 1997.

/s/
James F. Wyatt, III

Sworn to and subscribed before me on this
the 20th day of August, 1997.

Kay A. Williford
Notary Public

My commission expires: 2-22-98